No. 17762

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL JOHN CARBO, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT PAUL JOHN CARBO

APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA

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I.

COMMENT ON APPELLEE'S STATEMENT OF FACTS AND INTRODUCTION TO STATEMENT OF FACTS (Appellee's Br. pp. 9-126)

With appellee's efforts in setting out the facts having resulted in as long a presentation as it has, we think it would be of little help to the Court to dissect that Statement and dwell upon the many errors and incorrect nuances contained therein. We feel it proper, however, to point out a few.

At appellee's brief, page 12, it says:

"It was conclusively proven that Gibson used Carbo and Palermo in the operation of his business

and, conversely, it was shown that Carbo and Palermo used the I. B. C. in their extortive capacity. [34 RT 5050; 35 RT 5127, 5130 - 5136, 5138.]"

(Emphasis appellee's).

The transcript references are to Gibson's testimony as to the use of the term "underworld" in his appearance before the Kefauver Committee. There is no testimony therein either that Gibson used Palermo and Carbo in his business or that Carbo and/or Palermo used Gibson and/or the IBC in their extortive capacity or any other capacity or at all.

Moreover, its use by appellee against Carbo of this testimony of Gibson demonstrates the unfairness of the whole line of testimony having been admitted into evidence at all. Although the court instructed that this testimony was to be considered only against Gibson (RT 2692-3, 5050, 5130), the prosecution, through skilled counsel, trained to make distinctions and to consider evidence for the purposes and according to the limitations under which it is admitted, nevertheless uses this evidence in direct disregard of the court's instruction and uses it against Carbo, and the other defendants as well. This is a graphic demonstration, we believe, of appellee's whole approach to the case.

At appellee's brief, page 11, appellee distorts the meaning of defendant Palermo's statement on the witness stand (RT 5985) that, "We have been doing this for years. This is the first time this kind of a case ever came about."

What Palermo was referring to was his services in

obtaining a match with the champion in consideration of receiving from the manager of the challenger a portion of the manager's end of the purse. He was not referring to extortion, but to Leonard's promise to pay him for services rendered.

At page 11 of its brief, appellee, purporting to be making a statement of fact, says:

> "The other appellants, particularly Carbo and Palermo, were furtive and sinister in the day to day conduct of their business affairs. They were without roots in any community in this country and employed crude methods in the acquisition of money and economic power in boxing."

This is pure argument, not a statement of fact, and appellee cites nothing to support it.

At page 16 of its brief, in the paragraph beginning with the words "In the effort" and the following paragraph, appellee makes reference to the transaction in which Viola Masters (Mrs. Carbo) was paid $40,000.00 by the Neville Advertising Agency. All of the testimony regarding this transaction was limited to the defendant Gibson, and the court instructed the jury that it could not be considered as against Carbo nor any of the other defendants (18 RT 2692-3). Nevertheless, as elsewhere, appellee improperly does that very thing. The statement (Appellee's Br. p. 16) that "Consequently, Carbo was paid until 1957 . . ." is without foundation; as is the statement (ibid) that "Approximately $40,000 was paid to Carbo in this fashion" contained in the second paragraph. Nor is

there any basis for the statement (Br. p. 17) "that Gibson knew the payments were made for the benefit of Carbo is uncontroverted". The statement (Br. p. 17) that Gibson "caused" the payments to be made implies that he had something to do with authorizing them. The fact is that he testified he caused them to be made "in the sense of getting a check and sending it out" (32 RT 4772).

With reference to the $10,000 loan from Glickman to Carbo (Appellee's Br. p. 17), and the statement that it had been tendered in cash and no evidence of the debt received therefor, the prosecution did not call attention to the fact that the $10,000 loan was repaid by Carbo (29 RT 4283).

In connection with a phone call to one Viscusi, appellee makes the statement (Br. pp. 20-21) that Palermo said he had been told by the person on the other end that the latter did not have any money. The witness testifying was stating his conclusion as to what the other person said, viz., "I don't have it right now" (43 RT 6521). Nor does the prosecution add that after this conversation about "Looking in the drawers," the group laughed (ibid).

Appellee's statement (Br. p. 21) that at the Goldie Ahern party Carbo had talked to Glickman, Akins' manager, and said that a particular fighter was his, Carbo's, "and that Palermo should not worry about it" is not true. The record shows that the witness testified Carbo "was speaking to the group in general" when he made that statement -- and not to Palermo (43 RT 6525).

On Page 37 of Appellee's Brief it is stated that as a result of Glickman's threat to renege on his forty per cent of gross

contract, I. B. C. paid Glickman in excess of the contract filed with the California State Athletic Commission. Gibson did testify that they paid some $13,000 more than called for in the Commission form contract, but added "We consider our obligations to go much beyond what was down on a piece of paper." (33 RT 4857).

Appellee states (Br. p. 38): "Gibson told Leonard that Carbo's and Palermo's share of Jordan's purse would not be due until he won the rematch. [5 R. T. 619, 628]" (Emphasis added).

The transcript references make no mention of Carbo.

On pages 64 to 68 of Appellee's Brief, the purported telephone calls of April 28th from Carbo and Palermo to Leonard are discussed. Other than the bare statement that Nesseth left New York on April 27th and arrived in Los Angeles on the 28th and went to the Hollywood Legion Stadium, the prosecution has not set forth the actual facts concerning the testimony of both Nesseth and Chargin concerning that trip and its relation to the time when Nesseth arrived in Los Angeles and whether he could have been in Leonard's office at all when the calls were made. Under Point IX in our opening brief (Carbo Op. Br. pp. 74-77) in dealing with Count IX, we have discussed this matter fully and in detail, and there the Court will find references to the transcript not supplied by appellee and which portion of the transcript discloses the actual facts concerning this transaction.

Moreover, in this connection, appellee does not point out that the difference in time between Philadelphia and Los Angeles at the time of these purported telephone calls was three hours, so

that the calls would have been received here three hours earlier on the clock than the time they would have been placed in Philadelphia. Nor does the prosecution tell the Court in its Statement of Facts that the toll slips purporting to represent those calls (Exs. 21 and 22) do not indicate whether they were in the A.M. or P.M., and there was no showing on that subject adduced by the prosecution. However, the Court will note that despite those facts, the prosecution in its Appendix A, purporting to be a list of the telephone calls in evidence, has listed these calls as having been made in the P.M. (see calls Nos. 16 and 17, Govt's Appendix A).

On page 68 of its brief, appellee says that Carbo's presence in Philadelphia was "further confirmed" by the witness De John who saw Carbo and Palermo in a private residence in April or May, 1959.

Since this statement follows immediately the discussion of the telephone calls purportedly made by Carbo and Palermo, it is obvious that the statement "Carbo's presence in Philadelphia" was intended to have this Court believe that that "presence" was on April 28, 1959, and that that was "confirmed" by the testimony of De John. This is just another instance of the Appellee's use of a statement of argument as a substitute for a statement of facts. Nor is the argument sound, since De John testified that he "was not very sure if it was April or May" when he saw Carbo in Philadelphia, and there was no showing that he saw Carbo there on April 28th (RT 6577).

On page 122 of Appellee's Brief, reference is made to a

'phone call to Gibson from Carbo in which Gibson told Carbo that Leonard had testified at the hearing that Palermo had entered Leonard's office, and that Carbo had replied that Gibson must be mistaken, that Palermo had not entered Leonard's office. Significantly, the Government has omitted the balance of that conversation, in which Carbo said he had been reading about the hearing in the paper and that it was all a bunch of lies; also that Carbo had asked Gibson what reference had been made to him in the hearing, and Gibson told him that Leonard said he did not know him (Carbo), and that Carbo had said, "Well, that is funny. He knew me well enough to get money from me." (33 RT 4933-34). As, indeed, he had (RT 4515-16, 5163-66).

The innocuous treatment by appellee (Br. pp. 125-126) of its witness Leonard's attempt to extort $25,000 from Palermo in return for Leonard's not testifying, is dealt with below in Point VI, B.

* * *

We turn now to some of the legal questions in the case.

II.

THE SUPPLEMENTAL MOTIONS FOR NEW TRIAL UNDER RULE 25 SHOULD HAVE BEEN GRANTED (Reply to Appellee's Point VI, D, pp. 329-339).

Appellee has failed to come to grips with appellant's argument.

Appellant does not contend, as suggested by appellee (p. 330) "that the death of the trial judge subsequent to jury verdict is . . . , in itself, sufficient ground for ordering a new trial". Nor does appellant urge, as stated by appellee (Br. p. 333) "that a lengthy case such as this should be retried after the verdict of the jury simply because another judge sitting on the same court as the trial judge with jurisdiction over the appellants must rule on post-trial motions". Nor does appellant claim, as construed by appellee (Br. p. 333) that "a successor judge cannot fulfill the duties of the trial judge". Appellant does contend that when the prosecution's case, the very heart of it, depends upon whether its witnesses are telling the truth and when there is diametric conflict thereon, 1/

1/ E.g. Did Dragna talk to Leonard on May 4, 1959 about the fighter Toluca Lopez as Dragna testified he did (RT 5627) or was nothing discussed except the dispute between Carbo, Palermo and Leonard, as appellee says (Br. pp. 84-85) Leonard testified? Or, did Carbo get on the phone on January 27, 1959, while Palermo was speaking to Leonard, and use threatening language toward the latter as Leonard said he did (RT 658), or was it the fact that Carbo was not even with Palermo on the occasion of that telephone conversation and did not talk to Leonard at all, as Palermo says was the case? (RT 5974-5). And ought not the judge whose duty it is to pass upon the credibility of witnesses, have had the opportunity to take a look at and listen to the fellow -- (Cont'd)

the successor judge, no more than an appellate court, simply is not able to decide.

Appellee does not suggest that there was no conflict in the evidence; it does not suggest that Appendix B to the Carbo brief is inaccurate, albeit appellants will agree that because of the limitations of space and time it is by no means complete. Appellee simply ignores the whole subject. But ignoring it will not and does not remove the conflict.

Nor is the study and analysis given by the successor judge "dispositive of the question" (Appellee's Br. p. 332). Because of the conflict of evidence which appellee, as we have seen, chooses to ignore, the successor judge, being only human, could study the record from now until the end of time and refine his analysis interminably and he still would be in no position to judge the credibility of the witnesses and resolve that conflict. But it is to that very process of judging the witnesses that appellants are entitled on a motion for new trial (See Carbo Op. Br. p. 52). Not even appellee disputes this. And it is this very process of judging that was denied appellants.

It begs the issue to say, as does appellee (Br. p. 333), that

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1/ (Continued) the prosecution's "principal witness" (RT 7962) -- who solicited a bribe of $25,000 from one of the defendants in exchange for not testifying (see Carbo Op. Br. Appendix B, pp. 16-19), who testified falsely about that (see Point VI, B, herein, pages 88 - 96, infra), and who testified before other agencies and officials so differently from the way he testified at trial (see Carbo Op. Br. Appendix B, pp. 4-5, 8-9, 10-11), before attempting to exercise the important and fundamental function required of a trial judge in a motion for new trial? We think so.

"an extremely experienced successor judge has demonstrated his understanding of the trial record and has concluded that there is no problem of credibility". Saying that black is white does not make it so. The fact is that there is conflict in the evidence on virtually every major point in the case (see Appendix B to Carbo Op. Br.) and, most respectfully, the successor judge simply could not perform the function imposed upon the trial judge, under such circumstances, in passing on the motion for new trial.

Appellee suggests (Br. p. 335) that "in the year 1962", the demeanor of the witness is of no importance in seeking to ascertain where the truth lies. This is startling doctrine. Appellee cites no authority in support. The fact is that even in 1962, the demeanor of the witness is important in judging his credibility (Cf. Guzman v. Pichirilo, 369 U.S. 698; and see this Court in 1960 [Factor v. Commissioner of Internal Revenue, 281 F.2d 100, 111, cert. den. 364 U.S. 933]). The successor judge simply was in no position to so do. Appellee's assertion becomes the more amazing in the light of its having its principal witnesses, Nesseth, Leonard and McCoy, brought into the court room and seated during the prosecution's final argument behind the prosecution's table inside the rail (RT 6805, 6810) where, "at (prosecution counsel's) request" (RT 6805), "they can be observed" "so that" the jury's "recollection would be refreshed as to . . . their demeanor on the witness stand." (RT 7555).

The question now being discussed is not whether error was committed in the denial of the motions for new trial on the merits

(Appellee's Br. p. 336). 2/ (If the conflict in evidence be resolved in favor of defendants, it would be sheer arbitrariness not to grant

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2/ Appellee's characterization (Br. p. 336) of some of the defense witnesses' testimony as "absurd" is worthy of little comment. For example, appellee persists (ibid) in ridiculing Glickman's testimony that he loaned $10,000 to Carbo without a receipt. Aside from the immateriality of this testimony elicited by appellee on cross-examination (RT 4270-4271) appellee conveniently overlooks, and fails to make mention of, the fact that the loan was repaid (RT 4283).

the new trial.) The point is that defendants were entitled to have their motions for new trial passed upon by a judge who was able to fulfill the function the judge is required to fulfill on such a motion. The successor judge here was just unable to do so.

We do not understand appellee when it says (Br. p. 338): "When defendants in a criminal case decline to waive a trial by jury, they implicitly agree that they are willing to abide by the findings of fact of the twelve persons selected to sit in the jury box." 3/ What manner of judicial principle is this? Appellee, of course, cites no authority. Apparently what appellee is saying, or would have the court say, is that the motion for new trial is either non-existent or, if it still be with us, it should be discarded. This is not yet the law; Rule 33, Federal Rules of Criminal Procedure, is still here; the motion for new trial is very much in being and defendants are entitled to its full measure. (Cf. Mr. Justice Frankfurter, commenting on the fact that a petition for rehearing is not a mere formality, but serves, as we say a motion for new trial does, a very important function in our judicial processes [Flynn v. United States, 99 L. Ed. 1298, 75 S. Ct. 285].)

The supplemental motion for new trial under Rule 25 should have been granted. The trial court's failure to have done so

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3/ Appellee's citation (Br. p. 338) of a case involving the role of an appellate court on appeal demonstrates the confusion. A trial judge's role on a motion for new trial is not the same as an appellate court's role on review. On review, the appellate court does not weigh the credibility of witnesses; on a motion for new trial, the trial judge does just that (Carbo Op. Br. p. 52).

deprived appellant of a fundamental right and, therefore, deprived him of a fair trial.

III.

THE INSTRUCTIONS WERE ERRONEOUS

A. The Jury Was Not Instructed as to the Use of Declarations of an Alleged Co-Conspirator Made Outside the Presence of a Defendant (Reply to Appellee's Point VI, C, 2, (a) pp. 307-315).

Appellee has not responded to nor analyzed the cases cited by appellant (Carbo Op. Br. pp. 55-57). Its discussion of this point serves only to demonstrate, we submit, the complete failure of the trial court to instruct on this vital aspect of the law of conspiracy.

In the first place, we protest the concept that an instruction on March 14, 1961 as to a single conversation by one defendant outside the presence of the other defendants, although eminently necessary at the time it was given and correct in its terms so far as it went (see Appellee's Br. p. 308, referring to a purported conversation by defendant Palermo [RT 1664-1665]), can serve as a substitute for an instruction on the whole subject of the use of the declarations of alleged co-conspirators (not merely a single defendant) as against the other non-present alleged co-conspirators, two and one-half months later (May 27, 1961) when the instructions were given to the jury before it retired to deliberate (RT 7651-

7657, 7714-7715, 7718-7719; set out in full in Carbo Op. Br. pp. 25-33).

Secondly, appellant's contention is not, as stated by appellee (Br. p. 309), "that the jury must be satisfied that a declarant or actor was a member of the conspiracy before his words or acts in furtherance of the conspiracy and during the conspiracy may be considered against the co-conspirators". 4/ That is correct law, but is a separate question. The law as to which appellants complain no instruction was given is, and of this we assert there just can be no doubt, that a declaration of an alleged co-conspirator in furtherance of the conspiracy made during the existence of the conspiracy cannot be used or considered against an alleged co-conspirator not present unless there is evidence (and from the standpoint of instructions to the jury this would mean that the jury must be satisfied and must be so instructed) aside from the declaration itself that there is a conspiracy and that the defendant against whom the statement is sought to be used is a member thereof. This is the clear meaning of the cases and authorities cited by appellant (Carbo Op. Br. pp. 55-57), to which appellee has not replied nor analyzed. 5/

This is evident from the very formulation of the rule itself.

4/ Incidentally, this formulation by appellee in and of itself requires "the jury to compartmentalize", a process which appellee says a jury cannot be expected to do (Br. p. 315).

5/ We shall refer to Glasser v. United States, 315 U.S. 60, in a moment.

A declaration can be used against a non-present alleged co-conspirator defendant only if it is "in furtherance of the conspiracy". (United States v. Guido, 161 F. 2d 492 [CA 3 1947]). By very definition, therefore, this presupposes that the existence of the conspiracy has already been proven. Thus the out-of-presence declaration is admitted not to prove the conspiracy (cf. appellee's quotation [Br. pp. 310-312] from United States v. Dennis, 183 F. 2d 201, 230-231 [CA 2 1950], aff'd 341 U.S. 494), but to prove conduct in furtherance thereof. And, with due respect to the dictum relied upon by appellee from Dennis (appellee's quotation [Br. 314-15] from United States v. Manton, 107 F. 2d 834, 843 [CA 2 1938], cert. den. 309 U.S. 664, actually supports appellant, not appellee), if the proposition there stated means that just because the court allowed the out-of-presence declaration into evidence, that establishes, so far as the jury is concerned, that a conspiracy has been shown and that the defendant against whom the declaration is sought to be used is a member thereof, and if it means that the jury can consider the out-of-presence declaration to show that a non-present defendant was a member of the conspiracy (as appellee says is the case [Br. p. 315]) then the formulation is, we respectfully submit, simply not the law and it does indeed permit "hearsay (to) lift itself by its own bootstraps" (Glasser v. United States, 315 U.S. 60, 75).

We respectfully disagree (see Appellee Br. p. 313) that appellants misplace their reliance on Glasser. It is obvious that when the courts speak in connection with the rule in terms of the evidence being "inadmissible", they mean it not only in the strict

and technical sense of being admitted into evidence, but also in the sense of being considered by the jury. Thus, in Schmeller v. United States, 143 F. 2d 544, 551 (CA 6, 1944), the court said:

> " . . . (T)he court should have charged in connection with this subject that testimony as to conversations not in the presence of one or more of the various appellants and not binding on them were inadmissible against them unless the conspiracy was proved. "

And in Briggs v. United States, 176 F. 2d 317, 320 (CA 10 1949), cert. den. 338 U.S. 861, reh. den. 338 U.S. 882, the Court said:

> " . . . In his final instructions to the jury, the court specifically stated that numerous witnesses had testified to conversations had with some of the defendants, and that in each instance, such conversations were had with only one of the defendants. He . . . then admonished them that the existence of a conspiracy could not be established against an alleged conspirator by evidence of acts or declarations of others in his absence. And he went on to explain how the statements made by one, or to one of the defendants was not admissible against others until and unless by competent evidence the conspiracy was established, and the particular conspirator was

connected with it."

Simply put: if the law is that a defendant's membership in the alleged conspiracy can be established only by evidence of his own acts and declarations, the defendant is entitled to such an instruction. There just is no such instruction in any of those given by the trial court. The instruction relied upon by appellee (Br. p. 309) given as to defendant Gibson alone (RT 7714-7715), but not as to any other defendant (RT 7717-7719), is not sufficient, even as to Gibson. In the first place it refers only to "guilt or innocence", not to membership in the conspiracy. And in the second place it refers to words or conduct "of any other defendant", thus leaving out the important instruction as to the unindicted alleged co-conspirator, Daly. It goes without saying that even if sufficient as to Gibson, which it is not, the instruction is not sufficient as to the other defendants as to whom the court flatly refused to instruct (RT 7719). And the giving of the instruction as to Gibson demonstrates that the trial court felt such an instruction was necessary. But the very giving of it as to Gibson alone was additionally prejudicial to the other defendants for it virtually told the jury that as to them, no such rule was applicable.

The cases uniformly say that defendants in a conspiracy case are entitled to the instructions requested here by appellants. 6/

6/ See United States v. Flynn, 216 F. 2d 354, 362 (CA 2 1954), where the instructions given by the trial court included:

"In considering whether or not a particular defendant (Cont).

The entire argument of appellee, including its reliance upon the language it quotes from Dennis and its argument of no "compartmentalization" 7/ is, we think answered by Judge Mathes in his discussion of the problem in United States v. Schneiderman, 106 F. Supp. 892, 900-903 (SD Cal. 1952) in ruling on motions to strike.8/

6/ (Continued) became a member of the conspiracy, you must do so without regard to and independently of the statements and declarations of others. In other words, you must determine the initial participation of a particular defendant from the evidence concerning his own actions, his own conduct, his own declarations, or his own statements, and his own connection with the actions and conduct of others.

" . . .

"This instance of becoming a member of the conspiracy, as to which I have just instructed you, is the only instance in the case where a certain question can be determined only on the strength of certain evidence."

And cf. Bailey v. United States, 282 F. 2d 421, 425 (1960) and Yuge v. United States, 127 F. 2d 683, 689 (1942), cases in this Court.

7/ A process which is not unusual for a jury to be instructed about. For example: "You can consider this evidence only against this defendant and not against that one." Or, "this evidence can be considered by you only in connection with Count __ in the Indictment". And compare the complicated mental processes (compartmentalization, if you will) through which juries all over the country every day are instructed in an ordinary negligence case when the defense of contributory negligence is raised. (California Jury Instructions [B. A. J. I.] No. 113. And even more so when the plaintiff in such a case invokes the doctrine of Last Clear Chance [B. A. J. I. No. 205].)

8/ The convictions which later resulted in the case were reversed by the Supreme Court on the basis of other erroneous instructions (Yates v. United States, 354 U. S. 298) but not on those concerning the problem at hand and which are set out at Appx. A, below. See also this Court in the case Yates v. United States, 225 F. 2d 146, 159 (1955).

We set out in Appendix "A", attached hereto, what was said as to what instructions would be given on the point. That such instructions are clearly correct and required is seen by this from the Supreme Court in Lutwak v. United States, 344 U.S. 604, 618-619:

> "Relevant declarations or admissions of a conspirator made in the absence of the co-conspirator, and not in furtherance of the conspiracy, may be admissible in a trial for conspiracy as against the declarant to prove the declarant's participation therein. The court must be careful at the time of the admission and by its instructions to make it clear that the evidence is limited as against the declarant only. . . .
>
> "In the trial of a criminal case for conspiracy, it is inevitable that there shall be, as there was in this case, evidence as to declarations that is admissible as against all of the alleged conspirators; there are also other declarations admissible only as to the declarant and those present who by their silence or other conduct assent to the truth of the declaration. These declarations must be carefully and clearly limited by the court at the time of their admission and the jury instructed as to such declarations and the limitations put upon them. . . . " (First emphasis in original - second and third emphasis ours).

The trial court did not do that here. Its failure to so do was prejudicial error.

B. A Trial Court's Instructing the Jury That the Defendant May Appeal, Denies The Defendant a Fair Trial (Reply to Appellee's Point VI, C, 10, pp. 327-329).

Alice in Wonderland makes interesting reading (Appellee's Br. p. 327), but it does not answer the decisions of the courts (Carbo Supp. Br. pp. 3-4) to the effect that when a trial judge instructs a jury that if he makes a mistake, his action is subject to review by a higher court, such is reversible error and vitiates the trial.

The very words emphasized by appellee in its brief (p. 328) demonstrates the error of the trial judge in so instructing. Thus, compare the words appellee italicizes (Br. p. 328):

> "In other words, my word is subject to a review by higher courts; yours is not."

and (ibid):

> "Now, the reason why your decision on the facts is not subject to review on appeal . . . . "

with the words in United States v. Fiorito, 300 F. 2d 424, 426 (CA 7 1962):

> "That's why we have a court of appeals, they will reverse me if I'm wrong."

Nor was the jury conditioned as to the possibility of an

appeal only during the time of the instructions at the conclusion of the trial. At least on three other occasions during the trial and in the presence of the jury, the trial court let it be known that appeal was in the offing. Thus, during the colloquy wherein defendant Gibson was required to define the word "underworld", the Court said in the presence of the jury (R. 5047):

> "Well, sir, I don't want to argue with you further. If I am in error, the upper court can correct me."

And again (R. 5048):

> " . . . We are going to proceed in this fashion, and if it is prejudicial the gentlemen upstairs can take action on it."

The third occasion was when arrangements were being made for playing Exhibit C to the jury and defense counsel requested that the reporter take it down (RT 1570). Said the Court (ibid):

> "Well, Mr. Strong, I think the court will make an order that the tape or record be made an exhibit in the case so that it itself can go to the Circuit, if they need to review this procedure."

As stated, appellee did not choose to deal with the Fiorito case and the cases therein cited. Nevertheless, the law is, as there so clearly set forth, that such conduct and instruction by the trial court "vitiates the trial".

C. The Overt Act Instruction (Reply to Appellee's Point VI, C, 5, pp. 320-322).

Appellee virtually concedes (Br. pp. 320-321) that the instruction complained of is erroneous in the law. And, we submit, it cannot really be argued that there is no confusion when in one breath (RT 7651-7652) the jury is told that an act in furtherance of the conspiracy must have been committed by "one or more of the parties engaging in the conspiracy", and in another breath (RT 7645) that the act may be "done by one or more of the defendants or at their direction or with their aid".

What appellee is ultimately required to fall back upon (Br. p. 322) is the lack of an objection to the instruction after the instruction was given and before the jury returned. But this will not suffice. Since the principle goes to a fundamental part of the law of conspiracy, the giving of the erroneous instruction was plain error affecting the substantial rights of the parties and so Rule 52(b), Federal Rules of Criminal Procedure, applies. Moreover, appellee's contention based on Rule 30 demonstrates in a very real sense, the prejudice sought to be visited upon defendants by reason of the trial court's not advising what instructions it was going to give (See, e.g., Dragna Op. Br. pp. 39-43).

D. The Aiding and Abetting Instruction (Reply to Appellee's Point VI, C, 7, pp. 323-324).

Appellee's very argument in seeking to uphold the instruction demonstrates the error and the prejudicial nature thereof.

Thus, appellee states (Br. p. 323): "the (aiding and abetting) instruction related the two conspiracy counts to the eight substantive counts". In other words, says appellee, there is no need to keep the various counts separate; the whole thing is one hodge-podge and everything can be thrown in and considered without reference to whether or not it applies to the count charged. Unfortunately, this is precisely what was done in the court below and appellee's argument as to the validity of the aiding and abetting instruction demonstrates that this is so.

But the law is that "each count in an indictment is regarded as if it was a separate indictment". (Dunn v. United States, 284 U.S. 390, 393). "Although distinct offenses were charged in separate counts in one indictment, they nevertheless retained their separate character . . . " (Selvester v. United States, 170 U.S. 262, 268).

And appellee's argument (Br. p. 324) that Gibson and Dragna could have been charged with substantive crimes under the theory of Pinkerton v. United States, 328 U.S. 640 and, as explained in, Nye & Nissen v. United States, 336 U.S. 613, 619, runs full force into the constitutional right to due process of law. Whether these two defendants could have been so charged is beside the point;

the fact is that they were not so charged (hence the Pinkerton and Nye & Nissen cases are not applicable). And so what appellee's argument amounts to, and it demonstrates the force of appellant's claim to the error of the instruction, is that a defendant can be found guilty of a count charged based upon evidence attributable to a count not charged. This violates due process. "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." (Cole v. Arkansas, 333 U.S. 196, 201, citing DeJonge v. Oregon, 299 U.S. 353. 362).

Accordingly, when appellee argues (Br. pp. 323-324) for the relationship of a defendant in connection with a count with which he was not charged to prove a count with which he was charged, it is arguing for a conviction in violation of due process, thus demonstrating the invalidity of the aiding and abetting instruction.

IV.

EVIDENCE WAS IMPROPERLY RECEIVED

A. The Daly Statements Were Inadmissible (Reply to Appellee's Point VI, B, 8, pp. 267-281).

If the recordings (Exhs. 100-102, 176) of the May 14, 1959 conversation between Daly and Leonard were not introduced for the purpose of showing what Leonard said in that conversation (and

appellee claims [Br. p. 267] they were not) then they were inadmissible under DiCarlo v. United States, 6 F.2d 364, 366 (CA 2 1925), cert. den. 268 U.S. 702, cited by appellee (Br. p. 267) because Leonard's testimony of that conversation (RT 755-761) [9] was really not testimony as to a conversation but rather a recital of what Daly is supposed to have said.

But the more grievous error of appellee in its argument under this point is that it tries to show that Daly was a co-conspirator and therefore that his statements out of the presence of the defendants could be used against the latter (Appellee Br. pp. 268-277), by doing the very thing the law says cannot be done: use the statements which are the very subject of the objection to establish their own right to be admitted in evidence. [10] Appellee is thus attempting to have "hearsay . . . lift itself up by its own bootstraps to the level of competent evidence". (Glasser v. United States, 315 U.S. 60, 75). Irrespective of whether a defendant is entitled to an instruction to the jury as to the law on this subject, [11]

9/ In Carbo's Op. Br., p. 59, this reference is given as RT 432-438. This was in error. That was the old pagination of the Reporter's Transcript before the reporter prepared it for use on appeal.

10/ E.g., appellee says (Br. p. 273): "The contents of Daly's remarks on May 13 and May 14 provide circumstantial evidence of his complicity with appellants, since he reveals knowledge of the activities of the conspirators in these two conversations, activities with respect to Leonard, which could not have been known to him unless one or more of the conspirators had taken him into their confidence during the course of the conspiracy."

11/ This matter is discussed supra under Point III, A.

there is no doubt in the law that "such declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof aliunde that he is connected with the conspiracy" (ibid at p. 74).

Accordingly, stripping appellee's argument of its reliance on Daly's out of presence statements (Br. pp. 268-270), there is simply no, and certainly not sufficient, evidence aliunde to show that Daly was a co-conspirator. 12/ Significantly, appellee makes no effort to summarize the evidence aside from Daly's statements which even in its own view it contends shows Daly to be a co-conspirator. Instead it says (Br. p. 273): "(I)f Daly were not a member of the conspiracy charged how did he become so conversant with the facts of the relationship among Gibson, Palermo, and Carbo, in connection with the demand for control of Jordan?" citing (ibid), of all things, "Exhs. 100-102, 176, 101-A for Ident. at pp. 10, 21, 24, 30, 44-45", the very thing we are saying was inadmissible. This is a vivid demonstration of appellee's "boot-strap" argument.

Nor, in view of the motions to strike the Daly conversations at the close of the prosecution's case (see f. n. 12, supra), can the

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12/ Incidentally, appellee is in error when it states (Br. pp. 269 and 280) that defendants did not object to the Daly-Leonard, May 13, 1959 conversation. This clearly came under the "umbrella" ruling of the court (e. g. RT 412-413, 593-594, 2191) whereby objection did not have to be made to each such conversation because of the court's ruling on "order of proof" and subject to "motion to strike" (ibid). Said motions to strike the very May 13 conversation were appropriately made (e. g. CT 786, lines 13-14; 792-795; 798, line 21 and 30-32; 806, line 25); they were denied (CT 823).

prosecution save itself by reliance upon evidence produced as a part of the defendants' case (Appellee's Br. pp. 272-276). The question here is as to the admissibility of the evidence. It is enough that the defense be required to witness the evidence introduced, albeit conditionally, before the jury and heard by it on the theory of "order of proof" and "subject to a motion to strike". Certainly by the time the motion to strike is made, the prosecution's showing is complete; by that time the order of proof has ended. Since, as appellee's own argument seems to admit, there was not sufficient evidence aliunde by that time, the motions to strike should have been granted and the jury not permitted to consider it. The question of how well or how poorly defendants rebut evidence which has been permitted to remain against them (see cases cited in Appellee's Br. p. 275) is irrelevant, since the evidence was inadmissible in the first place.

With regard to appellee's startling assertion (Br. p. 277) that out-of-presence "declarations need not be in furtherance of the conspiracy so long as they are made by a co-conspirator during the period of conspiracy", we respectfully submit that this is an incorrect statement of the law. Appellee characterizes (Br. p. 279) the correct formulation by the United States Supreme Court [13/] as obiter dictum. Not so. It is true that in the cases cited by appellant (Carbo Br. p. 61), the statements were after the

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13/ E.g. Paoli v. United States, 352 U.S. 232, 237: "But such declarations can be used against the (non-present) co-conspirator only when made in furtherance of the conspiracy."

termination of the conspiracy. And it was for this reason that they were there inadmissible: since the statement must be "in furtherance of the conspiracy", such could not be the cases there where the conspiracies had ended. But the principle enunciated by the Court is clear.

For a case holding that a declaration not made in furtherance of the conspiracy though made by an admitted co-conspirator during the conspiracy cannot be used against other co-conspirators not present, see United States v. Guido, 161 F.2d 492, 494-495 (CCA 3 1947):

> " . . . Whether the conspiracy, alleged in count 4 of the indictment, based on the Espionage Act of 1917 came to an end on January 29 or January 30, 1943, and whether the conspiracy alleged in count 2, based on the Selective Training and Service Act, was a completed offense at a much earlier date by the simple agreement of the parties to the conspiracy to procure Frank B. Guido's release from the army, need not be decided for it is clear that the statements made by Frank B. Guido on January 30, 1943 were not in furtherance of the conspiracy. It follows that under the decision of the Supreme Court in Fiswick v. United States, 329 U.S. 211, 217, 67 S.Ct. 224, these statements of Frank B. Guido were not admissible in evidence against the appellants.
>
> " . . . The learned judge should have charged that since the admissions or confessions alleged to

have been made by Frank B. Guido were not in furtherance of the conspiracy, it was immaterial whether or not the conspiracy was still in existence, had been consummated, or had terminated and that the evidence given by the waitresses and the cook was admissible only as to Frank B. Guido."

Although, as we have shown (Carbo Br. Appx. C & D) the Daly-Leonard conversation was a hodge-podge of irrelevancies, including the portion relied upon so heavily by appellee (Br. pp. 279-280) concerning one Ray Arcel, appellee chooses (ibid) that portion of the "conversation" to show that Daly was talking in furtherance of the conspiracy -- to threaten Leonard. But how could this be so? Who brought up Arcel? Who asked about Arcel? How did the name Carbo come in in connection with Arcel? All these questions are answered by the name: Leonard. 14/

We submit that a fair reading of the Daly-Leonard conversation must result in the conclusion that it was not, whatever else it might be, in furtherance of the conspiracy.

14/ Thus Leonard brought up the subject of Arcel (Exhs. 100-102, 101-A, CT 1388): "You know they didn't like about Arcel. You know Arcel thought he was pretty smart too." And Leonard asked (ibid): "They never did get him either, did they?" And Leonard asked (ibid): "Did Arcel really see him or not? He probably didn't even know what hit him?" Appellee asserts that when Daly answered this type of question, his responses were statements made in furtherance of the conspiracy. Such illogic cannot be permitted. And it was Leonard, not Daly, who said (ibid): "Well, he was with Carbo for years."

B. Illegally Obtained Evidence Was Admitted

(1) Exhibits 100, 101, 102 and 176 (Reply to Appellee's Point VI, B, 4(b), pp. 243-248)

While, understandably, appellee attempts to state its case in the worst possible light from the standpoint of appellants, it simply is not the case, as asserted by appellee (Br. p. 245), that Leonard was "specifically ordered" (emphasis added) to see Daly in the latter's hotel room. It was a perfectly normal arrangement such as made thousands of times daily by business men and acquaintances to meet at another time and place (RT 754).

Be that as it may, whatever description is put to the mechanics of Leonard's being asked to meet Daly in the hotel room the next day, it was Leonard who was asked to come, not the Los Angeles Police Department. For in appellee's counsel's own view and words, when Leonard went into the Daly hotel room, wired for sound as he was, he went there as "an authorized operator . . . for the Los Angeles Police Department" (RT 7943).

In our opening brief (Carbo Op. Br. pp. 62-63) we suggested that this Court's decision in Todisco v. United States, 298 F. 2d 208, cert. den. 368 U. S. 989, was not correctly decided, based as it is on On Lee v. United States, 343 U. S. 747, which, we urged, no longer represents the law by reason of the later Supreme Court decisions. Accordingly, we urged this Court to reconsider Todisco and to overrule it. We believe we were right

in that suggestion and are still of that view. However, upon further reflection, we believe this Court can, and should, hold for appellants on the basis of violation of the Fourth Amendment without upsetting the reasoning of Todisco. This it can do on a ground not advanced in Todisco (nor in On Lee) but which is, we believe, sound, Fourth Amendment-wise.

Before discussing this phase of the matter, however, we shall dispose of appellee's erroneous argument questioning appellants' standing to object to the Fourth Amendment violation by the search of the Daly hotel room.

In the first place, the Government cannot have it both ways. It urges that the Daly transcription is admissible because in the whole transaction Daly was acting as one of the co-conspirators and as an agent of at least one of the defendants (Appellee Br. p. 276). It makes much (Br. p. 272) of the fact that Daly's expenses at the hotel were paid by defendant Gibson's company. Surely, then, the principal has standing to complain of violation of right as to the agent's premises, since the agent's premises are those of the principal. Since it is only on the theory that Daly's conduct, including his very being in and occupying the hotel room itself, was the same as that of the defendants (Appellee Br. p. 280) that his out-of-presence statements are at all admissible against them, this on the theory that it was the conspiracy at work, the Government is hardly in a position to say that violation of the rights of one of the conspirators is not a violation as to all (Cf. Weiss v. United States, 308 U.S. 321; and see particularly the Court of Appeals

decision in that case which articulated the invalidity of the Government's argument here)[15/].

By naming a defendant as a co-conspirator, the prosecution lays the basis for the use, against the defendants (his alleged co-conspirators) of the declarations of the named co-conspirator. By intentionally not naming him as a co-defendant, the prosecution can, so it asserts, use his out-of-presence declarations (although the result of an illegal search) when, concededly, if he were named a defendant, such declarations (if obtained in violation of the Fourth Amendment) could not be admitted into evidence. (Weiss v. United States, supra, 308 U.S. 321; McDonald v. United States, 335 U.S. 451, 456; Anderson v. United States, 318 U.S. 350, 356-357).

We submit that appellee's argument cannot be permitted to prevail. If it does, then a way has been found to circumvent, while violating the Amendment, the dictates of the Fourth Amendment. By the device of not indicting a co-conspirator, but at the same time violating his Fourth Amendment rights, the way is open, so says appellee, to introduce evidence illegally obtained. But the Fourth Amendment, nor any constitutional right, is not so

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15/ " . . . It may be said with some plausibility that the defendant Goldstein was not prejudiced since he was neither a party to, nor mentioned in, the conversations obtained through wire tapping. These conversations, however, showed that Goldstein's codefendants were engaged in a conspiracy which other proof indicated that he joined. They also gave credence to the testimony of Messman. Such evidence weighed against Goldstein and his conviction ought not to stand if the communications implicating the others were improperly received. . . ." (103 F. 2d 348, 352).

easily subverted. As this Court has said (Taglavore v. United States, 291 F. 2d 262, 266 [1961]):

> "The violation of a constitutional right by a subterfuge cannot be justified, ... (otherwise) a mockery could be made of the Fourth Amendment and its guaranties. ..."

Furthermore, appellants' interest in the hotel room was surely equal to, and gave appellants as much standing, as the defendant in Jeffers v. United States, 342 U.S. 48, where the hotel room was that of the aunts of the defendant who had not given defendant permission to store the narcotics which were seized there. Jeffers had not checked into his aunts' room either. 16/

Moreover, appellee fails to appreciate and give support to what is the basis for the rule as to the inadmissibility of evidence obtained in violation of the Fourth Amendment. It is clear that the reason for the rule is to deter law-breaking on the part of the

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16/ Neither of the two cases relied upon by appellee (Br. p. 245) assists it. The articles referred to in appellee's reference to Abel v. United States, 362 U.S. 217, 240-241, which were taken from the wastepaper basket after Abel had paid his bill and vacated the room were, as the court pointed out, abandoned articles. As the court said (362 U.S. at 241), "There can be nothing unlawful in the Government's appropriation of such abandoned property." Furthermore, again as the court pointed out (ibid), Abel had vacated the room and gave up his occupancy thereof. The control was then in the hotel, which gave its consent to the search. This Court's later decisions in Plazola v. United States, 291 F. 2d 56, 63 (1961) and Contreras v. United States, 291 F. 2d 63, 65 (1961) demonstrate that the footnote in this Court's decision in Eberhardt v. United States, 262 F. 2d 421, 422 (1958), no longer represents the law.

Government and not permit the federal courts (indeed any court in the land [Mapp v. Ohio, 367 U.S. 643]) to be a party to a process of law violation by the Government.

Thus, in the Mapp case, supra, the court, in commenting on its decision in Elkins v. United States, 364 U.S. 206, which overturned the "silver platter" doctrine, said (367 U.S. at 654):

> " . . . The Court concluded that it was therefore obliged to hold, although it chose the narrower ground on which to do so, that all evidence obtained by an unconstitutional search and seizure was inadmissible in a federal court regardless of its source. . . ."

And the court quoted from (367 U.S. at 659) and adopted the judicial philosophy of Mr. Justice Brandeis' famous dissenting opinion in Olmstead v. United States, 277 U.S. 438, 485:

> " . . . 'Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. . . . If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.' . . . "

It will be remembered that in this same opinion, Mr. Justice Brandeis, in pointing out how strong is the rule against permitting the use by the Government of evidence illegally obtained, said that even if the defendant waives the objection, nevertheless "the objection . . . will be taken by the court itself. It will be taken despite the wish to the contrary of all the parties to the litigation.

The court protects itself." (Emphasis added; 277 U. S. at 485).

And so in Mapp, the court specifically noted (367 U. S. at 651) the adoption of the exclusionary rule by California in People v. Cahan, 44 Cal. 2d 434 and pointedly called attention (367 U. S. at 651) to the reasoning in that case wherein the California Supreme Court said (44 Cal. 2d at 445) it was "compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions". This reasoning the court re-affirmed in Mapp (367 U. S. at 652-653).

As the Court said in Elkins v. United States, 364 U. S. 206, 217:

> ". . . The rule is calculated to prevent, not to repair. Its purpose is to deter -- to compel respect for the constitutional guaranty in the only effectively available way -- by removing the incentive to disregard it. . . ."

Accordingly, this Court cannot permit the argued for formula advanced by appellee and thus present an incentive to law enforcement officers to, indeed, flout "respect for the constitutional guaranty".

Other Supreme Court decisions, for example, Walder v. United States, 347 U. S. 62, 64-65 and McDonald v. United States, 335 U. S. 451, 456, prompted the California Supreme Court to say (People v. Martin, 45 Cal. 2d 755, 760):

> "The United States Supreme Court has clearly

recognized that the purpose of the exclusionary rule is not to provide redress or punishment for a past wrong, but to deter the lawless enforcement of the law. . . ."

And so, to deter such lawless law enforcement, according to the California Court (45 Cal. 2d at 761), "whenever evidence is obtained in violation of constitutional guarantees, such evidence is inadmissible whether or not it was obtained in violation of the particular defendant's rights". Otherwise (45 Cal. 2d at 760), the courts are " 'constantly required to participate in, and in effect condone, the lawless activity of law enforcement officers' ". Continued the California Court, as though speaking of the very case at bar (ibid):

> "This result occurs whenever the government is allowed to profit by its own wrong by basing a conviction on illegally obtained evidence, and if law enforcement officers are allowed to evade the exclusionary rule by obtaining evidence in violation of the rights of third parties, its deterrent effect is to that extent nullified. Moreover, such a limitation virtually invites law enforcement officers to violate the rights of third parties and to trade the escape of a criminal whose rights are violated for the conviction of others by the use of the evidence illegally obtained against them."

It may be that the California Supreme Court in the Martin case, supra, 45 Cal. 2d at 761 (see also, People v. Gale, 46 Cal. 2d 253, 257) has too broadly stated the effect of the applicable United States Supreme Court decisions upon which it relied. But this Court need not decide that question in this case. As argued elsewhere (Point IV, A, supra), the Daly-Leonard conversation was inadmissible because, inter alia, Daly was not shown to be a co-conspirator. If, however, the court should rule against appellants on this point, then by that very token -- i. e., admissibility on the theory of a declaration made by a co-conspirator in furtherance of the conspiracy during the existence thereof -- appellants are sufficiently directly involved. (Cf. Weiss v. United States, 308 U. S. 321; McDonald v. United States, 335 U. S. 451, 456; Anderson v. United States, 318 U. S. 350, 356-357, supra).

Appellants have standing to object.

We turn now to a discussion of the unargued and, therefore, unconsidered question in the Todisco case, namely, whether the electronic eavesdropping conduct of the Government officers here was illegal and in violation of the Fourth Amendment because it was a search for evidence.

It cannot be gainsaid that the Los Angeles Police Officers through their "authorized operator", Leonard, were engaging in their electronic eavesdropping for the purpose of, and they were, searching for evidence and not, for example, for weapons, contraband or instrumentalities of crime. Their very purpose, and their only purpose, in wiring Leonard for sound was to search for

evidence of crime. But assuming that Leonard, and his electronic partners, were lawfully in the hotel room and therefore committed no trespass, the search was nevertheless unlawful. A search of another's premises for evidence is not permitted by the Fourth Amendment whether with or without a search warrant. This is a distinction which is deeply rooted in the law and recognized by all courts, including, of course, this one.

In Gilbert v. United States, 291 F. 2d 586, 596 (1961), this Court said:

> "We think we must recognize and respect ' * * * the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including [1] the instrumentalities and means by which a crime is committed, [2] the fruits of crime such as stolen property, [3] weapons by which escape of the person arrested might be effected, and [4] property the possession of which is a crime. ' Harris v. United States, supra, 331 U. S. at page 154, 67 S. Ct. at page 1103. (Numbers inserted.)"

Nor was this new doctrine for this Court. As said in Woo Lai Chun v. United States, 274 F. 2d 708, 710 (1960):

" ... In Takahashi v. United States, 9 Cir., 1944, 143 F. 2d 118, at page 123, we laid down the general proposition 'that a reasonable seizure can only be made of instrumentalities of the crime itself and not of private papers which are mere evidence or indicia of the commission of a crime'." (Emphasis added).

That this Court is clearly correct is seen from a number of Supreme Court cases. For example, United States v. Leftkowitz, 285 U. S. 452, 454-456:

"Respondents' papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things and disclosing exactly where they were." (Emphasis added).

And Abel v. United States, 362 U. S. 217, 234-235:

" ... We have held in this regard that not every item may be seized which is properly inspectable by the Government in the course of a legal search; for example, private papers desired by the Government merely for use as evidence may not be seized, no matter how lawful the search which discovers them, ..." (Emphasis added).

And United States v. Rabinowitz, 339 U.S. 56, 64:

> "There is no dispute that the objects searched for and seized here, having been utilized in perpetrating a crime for which arrest was made, were properly subject to seizure. Such objects are to be distinguished from merely evidentiary materials which may not be taken into custody. . . . This is a distinction of importance, for 'limitations upon the fruit to be gathered tend to limit the quest itself. . . . ' . . ." (Emphasis added).

What appellee did here was listen to two and one-half hours of the private life of Daly in his hotel room, listening to both the relevant and irrelevant "in the hope that evidence of crime might be found". (Go-Bart Importing Co. v. United States, 282 U.S. 344, 358). As in United States v. Leftkowitz, 285 U.S. 452, 462, "the search (was) general, for nothing specific . . . and based only on the eagerness of officers to get hold of whatever evidence they may be able to bring to light". Such conduct violates, in a very fundamental sense, the rights guaranteed by the Fourth Amendment. For, as said in Federal Trade Commission v. American Tobacco Company, 264 U.S. 298, 306:

> " . . . It is contrary to the first principles of justice to allow a search through all of the respondents' records, relevant or irrelevant, in the hope that something will turn up."

It matters not that the rummaging here was of Daly's private conversation and not physically of his drawers and papers.[17] As said in Boyd v. United States, 116 U.S. 616, 29 L.Ed. 746, 751:

> " . . . It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense; . . . "

Since the officers here were searching for evidence of crime, their conduct violated the Fourth Amendment and the evidence thus obtained was, consequently, inadmissible.

We do not think it can be argued that electronic eavesdropping is not a "search".

Mapp v. Ohio, 367 U.S. 643, in quoting (at page 659) from the dissent in Olmstead v. United States, 277 U.S. 438, which clearly held wire-tapping to be a search, and in commenting (367 U.S. at 654) upon the court's previous decision in Irvine v. California, 347 U.S. 128, 134, recognized that electronics eaves-

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17/ Cf. Mr. Justice Brandeis, dissenting in Olmstead v. United States, 277 U.S. 438, 474: "Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions."

dropping was a search. In the Irvine case, a concealed microphone case, the Court said (347 U.S. at 132):

> " . . . Science has perfected amplifying and recording devices to become frightening instruments of surveillance and invasion of privacy, whether by the policeman, the blackmailer, or the busybody. . . . Few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment. . . . "

And in comparing Irvine with Wolf v. Colorado, 338 U.S. 25, the Court said (347 U.S. at 133):

> " . . . Actually, the search was offensive to the law in the same respect, if not the same degree, as here. . . . "

Even Goldman v. United States, 316 U.S. 129, and On Lee v. United States, 343 U.S. 747, though deciding that there was no Fourth Amendment violation because there was technically no trespass (in neither of these cases so far as appears from the reported decisions was the "search for evidence" argument made), did the court even suggest that no "search" was made. On the other hand, Silverman v. United States, 365 U.S. 505, clearly recognizes that "listening in" is a search. Thus, the Court said (at page 512):

> " . . . This Court has never held that a federal

officer may without warrant and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard."

We think it self-evident that if the eye can search, so also can the ear. Indeed, when the ear is extended by means of electronics, the search is the more pervasive.

Accordingly, we submit, the search here being for evidence, it violated the Fourth Amendment. The exhibits should have been excluded. 18/

18/ Appellee's reliance (Br. p. 248) on Walder v. United States, 347 U.S. 62, 65, as ground for the admissibility of Exhibit 176 is misplaced. In the first place, Exhibit 176 is simply the same thing as Exhibits 100 and 101 which were introduced not on rebuttal as a result of evidence brought out by the defendants in their case in chief, but were introduced directly as a part of the Government's case in chief. Moreover, Exhibit 176 being, as appellee states, exactly the same as 100, and Exhibit 101-A for Identification being a typewritten transcription of both of them, the latter shows on its face by the asterisks (explained as meaning "unintelligible word or phrase" [CT 1357]) that there were omissions in 101-A for Identification from what was said on May 14th. Indeed 101-A shows that there were not 10, as counted by appellee (Br. p. 246, but 107 asterisks (omissions) from 101-A for Identification. Daly was shown Exhibit 101-A for Identification not 100 (RT 3126), and asked if there were subjects discussed between him and Leonard on May 14 "that are not referred to in that transcript" (emphasis added; RT 3126). Since the transcript on its face shows that there were omissions, how can the introduction of 176 show that there were not? In any event, even if Exhibit 176 was properly allowable at that stage of the proceedings, that fact cannot cure the error of the introduction of Exhibits 100-102 as a part of the prosecution's case in chief.

(2) Exhibit 177 (Reply to Appellee's Point VI, B, 4(a); pp. 240-243)

As pointed out in the Opening Brief (Carbo Op. Br. p. 64) Rathbun v. United States, 355 U. S. 107, does not, as appellee urges it does, apply to the type of device which was used in the case at bar. Carnes v. United States, 295 F. 2d 598 (CA 5 1962), cert. den. 369 U. S. 861, is not, we submit, correct law.[19/] It should be noted that, as will be seen from the discussion below, the court in that case, though quoting (295 F. 2d at 602) the portion from Rathbun (355 U. S. at 111) which points up the narrowness of that decision and the rationale thereof, failed to apply that reasoning to the case before it. Additionally, in the Carnes case, the violation of the Regulations of the Federal Communications Commission, discussed hereinafter, which was involved in the officer's conduct, was not called to the attention of the Court of Appeals or the Supreme Court. The Solicitor General, in his opposition in the latter court urged this failure as one of the grounds for opposition to the granting of certiorari. (Brief for United States in Opposition, pp. 8-9, No. 786, Oct. Term 1961). Not only is appellant here calling the FCC regulation to this Court's attention, but it likewise called attention thereto in the court below (CT 1288-

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19/ Contrary to appellee's assertion (Br. p. 241), there is no showing that the recordings introduced by defendant Palermo (Exhs. C, D and E) were obtained by means of an electrical induction coil attached to the telephone receiver, as were the means used by appellee here (Appellee's Br. p. 241).

1289).

In Rathbun, the court carefully made a distinction between the reception in evidence of testimony by a person who was listening in, with the permission of the subscriber, on an extension phone, so-called, and a recording of a conversation by the means used in the case at bar: an electrical induction coil attached to the telephone itself (Appellee's Br. p. 241).

At page 64 of our Opening Brief we set forth the limited question that was before the Supreme Court in Rathbun. The whole tenor of the Court's opinion makes clear that it was only because the hearing by the third party was on a regularly installed extension phone, not a device installed on the phone for the purpose of hearing that conversation, that it held there was no interception and therefore no violation of §605.

Thus, the court said (355 U.S. at 108):

> " . . . This extension had not been installed there just for this purpose (to overhear this particular conversation) but was a regular connection, previously placed and normally used. . . . " (Emphasis added).

As distinguished from an induction coil placed on a telephone for the specific purpose of overhearing a particular conversation, the Court pointed out:

Pages 109-110:

> "The telephone extension is a widely used instrument of home and office, yet with nothing to evidence congressional intent, petitioner argues

that Congress meant to place a severe restriction on its ordinary use by subscribers, denying them the right to allow a family member, an employee, a trusted friend, or even the police to listen to a conversation to which a subscriber is a party. . . ." (Emphasis added).

Page 111:

"Common experience tells us that a call to a particular telephone number may cause the bell to ring in more than one ordinarily used instrument. Each party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation. When such takes place there has been no violation of any privacy of which the parties may complain. . . . " (Emphasis added).

Contrary to the situation thus spoken of by the Court, a party to a telephone conversation does not take the risk that the party on the other end will have a device attached by Governmental investigative agencies to the telephone which, without his knowledge or consent, records the conversation. Contrary to the use of an extension phone and the listening thereon, the use of the induction coil device without the consent of the party, has all the vice of an actual wiretap and falls within the conduct Congress sought to ban by §605; it is another variant of official intrusion into privacy.

The Government in its brief before the Supreme Court in Rathbun recognized the distinction and pointedly made it in support of its argument. Thus in its brief, the Solicitor General argued:

Page 12:

"The legislative history shows that Congress intended to safeguard the privacy of means of communication by forbidding the surreptitious interjection of an independent device for the purpose of interception by a listener or a recorder, not to protect the message from disclosure by the receiver." (Emphasis added).

Page 14:

"The issue in this case, therefore, is whether listening on an extension telephone is an interception imposed upon the communication system or merely the overhearing of a message sent through a system which has not been tampered with."

To show that an extension phone is not a "surreptitious interjection of an independent device for the purpose of interception by a listener or a recorder", the Government further said in its brief (page 17, f.n. 9):

"The use of the term 'extension' may be misleading. In general use, all telephone instruments installed in a home are on a parity; no one is the principal receiver and the others subsidiary. In this case, it appears to have been a matter of chance, or convenience, which instrument Mr. Sparks used.

Thus, the use of the word 'extension' really means another regularly installed telephone instrument." (Emphasis added).

And demonstrating the difference between a regularly installed and used extension phone, and the device used in the case at bar, the Solicitor General called the following to the attention of the Court (pp. 16-17, f. n. 8):

"Orders of the Federal Communications Commission dated November 26, 1947, and May 20, 1948, applying to interstate and foreign calls, require telephone common carriers to post tariff schedules for the permanent attachment of mechanical recorders and transcribers to subscriber telephones. The attachment is usually made at the bell box of the telephone instrument and may be made only by the telephone company. A condition of such an installation is that an automatic tone warning device be used in connection with it. If the subscriber makes his own permanent connection and does not use the warning device he commits a breach of his contract with the telephone company and may be subject to the sanctions of 47 U.S.C. 401 and 411. However, there are three general types of recording devices which may be used with a telephone circuit. The first relies upon a direct physical connection to the telephone circuit. This system is subject to detailed regulation as

mentioned above. 20/ The second is the inductive type which relies upon the use of an induction coil placed in proximity to the telephone lines. The Commission regards its use as prohibited by the Commission's orders. The third is the accoustic type which amplifies and records the telephone message as it is reproduced at the handset. The Commission expressly has not attempted to regulate the use of this type. (Citation)." (Emphasis added).

Thus, it is clear that there is a vast difference between the use of a regularly installed telephone extension and the surreptitious use of an induction coil made recording. It is this latter which is Exhibit 177. We submit that the Federal Communications Commission is correct and that the use of such a device is illegal.

47 U.S.C. 502 provides that violation of "any rule, regulation, restriction, or condition made or imposed by the (Federal Communications) Commission" is a crime. In contradistinction to the argument of appellee (Br. p. 248) that the rules as to operating a radio without a license have to do with the avoidance of jamming the electronic spectrum, and therefore operation without a license should not result in the inadmissibility

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20/ Cf. United States v. Stephenson, 121 F. Supp. 274 (DC DC 1954) app. dism. 223 F. 2d 336 (CA DC 1955) holding inadmissible a recording made from this type of an installation without the "beep".

of the evidence so obtained (e. g. Exhibit 176 in this case), the Commission's regulations as to tampering with telephone wires or instruments are directly concerned with the "guarantee (of) rights of privacy" as protected by 47 U. S. C. 605, and violation thereof should come directly within the rule of exclusion (Nardone v. United States, 302 U. S. 379 and 308 U. S. 338).

The Exhibit should not have been admitted into evidence.

C. Nesseth's and McCoy's Out-of-Presence Statements as to What Leonard Said Some Of the Defendants Said (Reply to Appellee's Point VI, B, 5; pp. 249-252).

(a) Replying to our contention that the testimony of Nesseth and McCoy as to what Gibson, Palermo and Carbo, respectively, had allegedly told Leonard, was hearsay and inadmissible (Carbo Op. Br. pp. 17-19, 65), the prosecution contends that this testimony was admissible because "Leonard was used as a conduit of threats intended by appellants for Jordan's managers, Nesseth and McCoy"; that "[f]or the purposes of these messages, Leonard was a talking agent of appellants" (Appellee's Br. p. 249).

There is no showing in the record that Leonard was used as a "conduit" nor as an "agent of appellants". As a matter of fact, the indictment charges in Counts I and V that the appellants were to use threats of physical harm and violence to Leonard as well as

to Nesseth in order to obtain a share of the purses earned by the fighter Jordan (CT 3, 9); that they intended to obtain monies from "the victims" Nesseth and Leonard without paying any consideration therefor (ibid and 10); that Sica and Dragna were enlisted to contact Leonard and Nesseth and obtain their agreement to the conspirators' demands (CT 3, 10); and, finally, Gibson was to use his influence to persuade Leonard and Nesseth to accede to the demands of the conspirators (CT 3-4, 10). In Counts II and III (CT 6, 7), the extortion and attempted extortion counts, Leonard is the person allegedly threatened. Counts VI and VII (CT 12, 13) charge interstate telephone threats by Palermo and Carbo, respectively, to injure Leonard. Counts VIII and IX (CT 14, 15) charge interstate telephone threats by Carbo and Palermo, respectively, to injure Leonard and Nesseth; and Count X (CT 16) charges an interstate telephone threat by Palermo to injure Leonard and Nesseth.

So we find that not only was Leonard not the agent of these appellants, or any of them, but he was alleged to have been the victim of their extortion and attempts to extort; and the testimony of the prosecution witnesses was offered for just that purpose -- to show that attempts were made to extort from Leonard and, in fact, to show an actual extortion of $1,725.00 from Leonard. The prosecution witnesses testified also as to the threats of physical violence purportedly made by Carbo against Leonard.

In the purported conversation between Carbo and Leonard on January 27, 1959 in which Carbo is supposed to have told

Leonard, among other things, that if the money wasn't there right away somebody would be looking him up (5 RT 658; Appellee's Br. pp. 48-49), there is nothing therein indicating that that statement was to be transmitted to Nesseth, and Nesseth's testimony as to what Leonard told him was as follows:

> "[T]he substance was that if these people didn't get the money that they felt they had coming from the Jordan-Gutierrez fight, they were going to take it out of Leonard's hide. This wasn't actually all that was said, but that was the substance of it. [13 R. T. 1798.]" (Appellee's Br. p. 50).

There, too, it will be observed, nothing was said with reference to that statement's being something which Leonard was to tell to Nesseth.

And the same situation applies to the telephone conversation purportedly had between Carbo and Leonard on April 28, 1959 in which Carbo is supposed to have threatened Leonard, and Nesseth was permitted to testify as to what Leonard told him Carbo had purportedly said to Leonard on the phone (5 RT 680-681; Appellee's Br. p. 65). In that purported conversation between Leonard and Carbo not one word was mentioned with reference to Nesseth nor to transmitting the contents of the conversation to him, and while Nesseth was permitted to testify that Carbo had told Leonard to tell "that blankety-blank car salesman nobody has ever gotten away with this and he won't get away with it either" (13 RT 1824) there is nothing other than Nesseth's statement in the record to

indicate that that statement was ever made by Carbo or that he had authorized Leonard to make such a statement to Nesseth; in fact, Leonard does not testify that such a statement was made by Carbo (5 RT 680-681).

The same situation prevails with reference to the purported phone call from Palermo to Leonard within a few minutes after the call of April 28th just referred to (13 RT 1827-1828; Appellee's Br. p. 67). Here again nothing was said about Nesseth in that phone call, either about Leonard's telling Nesseth about the phone call, or otherwise. And yet as the prosecution put it, "Nesseth also corroborated Leonard's testimony as to Palermo's threatening call" (13 RT 1827-1828; Appellee's Br. p. 67; emphasis added).

If there had been statements made to Nesseth by Leonard as to what Carbo is purported to have said to Leonard, the question first is, were those statements to Nesseth made by Leonard pursuant to a direction from Carbo, or were they made to serve some purpose of his own.

We submit that there is nothing in the evidence to warrant a finding that Leonard's statements to Nesseth were made pursuant to a direction or authority of Carbo, and nothing to show that Leonard was acting as an agent of Carbo nor of any of the other appellants.

Moreover, the theory of the prosecution being that Leonard was acting as agent of Carbo in relating to Nesseth what Carbo purportedly said to Leonard, then the court should have instructed the jury upon the necessity of the prosecution's establishing the

principal-agency relationship between Carbo and Leonard and the rule as to how and in what manner a principal can be bound by the acts of an agent in a criminal case.

Under the contention that Leonard was acting as an agent of the appellants in connection with the statements made by Leonard to Nesseth and McCoy, the prosecution makes the following observation:

> " . . . No hearsay danger is involved since the declarant (Leonard) testified to the original event (the call or meeting with the conspirators) and was subject to cross-examination thereon before Nesseth or McCoy corroborated Leonard's testimony that he had communicated the threats to them." (Emphasis in original; Appellee's Br. p. 249).

No authority is cited in support of this unique principle. We fail to see how the fact that Leonard had testified to the matters which were the subject of his statements made to Nesseth and McCoy and/or the fact that he was subject to cross-examination thereon before Nesseth or McCoy "corroborated" Leonard's testimony that he had communicated the threats to them, removes the matter from the hearsay rule. Leonard was not a defendant, and he was not a co-conspirator. The statements made by him to Nesseth and McCoy were made outside of Carbo's presence and without his knowledge. Furthermore, it was not only Nesseth's and McCoy's testimony that Leonard "had communicated the threats

to them" (and which the prosecution says thus corroborated Leonard's testimony to that effect) to which we are directing our attack; more serious was the actual repetition by Nesseth and McCoy of the details of the statements made to them by Leonard. As was the case with Leonard, neither Nesseth nor McCoy was a defendant nor a co-conspirator and what they purportedly heard from Leonard and to which they were permitted to testify was plain hearsay.

(b) The next proposition stated by the prosecution under this point is that

> "Since fear in the minds of the victims is a necessary element in an extortion case, evidence circumstantially establishing this state of mind is competent, material, and relevant. ... " (Appellee's Br. pp. 249-250).

No one could quarrel with that principle of law, but we fail to see its applicability to the issue involved here.

Under that rule, the evidence has to be of some probative value. The mere fact that the victim told some one else that he had been threatened is not necessarily proof that he was in fear, and certainly cannot be used as substantive evidence that the threats had been made. In other words, the statements of Leonard to Nesseth had no probative value in establishing Leonard's fear. If we assume that the declarations were made for that purpose, then, under the prosecution's theory those declarations were

evidence only as to Leonard's state of mind -- but they were not and could not be substantive evidence that the threats had been made by Carbo.

However, in addition to the fact that the evidence is not sufficient to show Leonard's state of mind, and cannot be used as substantive evidence to prove that Carbo made the threats, the prosecution finds itself in this position: that in the trial court it did not offer this evidence to prove the state of mind of Leonard, the basis upon which it now claims its admissibility, but upon a wholly different theory, viz., that Leonard was an agent of appellants for the purpose of transmitting to Nesseth the contents of the telephone conversations purportedly made by Carbo to Leonard, and that Nesseth's testimony corroborated Leonard's testimony as to what Carbo had said to Leonard.

For example, in a discussion in the trial court relative to the admissibility of this testimony, the prosecutor said:

> "Basically the theory of the Government in this case, your Honor, is that the defendants were using Jackie Leonard as a contact man and an instrument for putting pressure upon Don Nesseth, in order to get control of Nesseth's fighter, Don Jordan.
>
> " * * *
>
> "So we have to bring out through Nesseth what Leonard had told him.
>
> " * * *
>
> "I would say there is an agency theory here to

some extent. They are using Leonard as their agent." (RT 1765).

And again in the prosecution's Memorandum of Points and Authorities filed in connection with the Motions for New Trial, we find the following statement (CT 1459):

> "There is dramatic corroboration of Leonard's testimony concerning the telephone threats from Carbo." (Emphasis ours).

Then follows a description of the April 28, 1959 occurrence when Carbo purportedly threatened Leonard on the telephone (CT 1459).

And in the same document is the following statement by the prosecution:

> "Further corroboration of this Carbo telephonic threat stems from the fact that Leonard testified that within a few minutes of talking to Carbo the phone rang again and this time Palermo was on the line trying to calm Leonard down, *** Nesseth corroborates the fact that the second call was received and that Leonard said it was from Palermo. ... " (CT 1460; Emphasis ours).

We believe it is unnecessary to cite authority supporting the fundamental rule that when the prosecution has offered evidence in the trial court upon a certain theory, and such evidence has been received by the court and considered by the jury upon that

theory, the introduction and reception of that evidence cannot be supported on appeal upon a different theory.

(c) The next assertion made by the prosecution in connection with this point is that the testimony of Nesseth and McCoy was "proper corroboration of Leonard's testimony" (Appellee's Br. p. 250); that "Nesseth and McCoy were called to corroborate the essential framework of Leonard's story" (Appellee's Br. p. 251); and, finally, "as circumstantial corroboration" of Leonard's testimony on the witness stand, "Leonard's statements to Nesseth and McCoy were clearly admissible as prior consistent statements of a witness made prior to a time when he had a motive to fabricate" (Appellee's Br. p. 251; Emphasis added).

Once again, the prosecution refers to principles of law about which there can be no question. And once again the prosecution fails to show their applicability to the point in issue; in fact, the prosecution's argument in this respect demonstrates clearly the inapplicability of those rules of law.

Generally speaking a witness can not be rehabilitated by proof of prior consistent statements -- such proof is of no probative value.

> " . . . A prior consistent statement by a witness adds nothing to the probative value of his testimony at the trial. 2 Wigmore, Evidence §1125 (3d ed. 1940). If McLaughlin told the truth at the trial he may very well have told it December 11. If he lied at the trial

his statement of December 11 only shows that he lied consistently."

United States v. Toner, 173 F. 2d 140, 143.

However, there seems to be a contrariety of opinion on this question among the courts, as indicated by the discussion in McCormick on Evidence (1954) Ch. 5, Par. 49:

"There is much division of opinion on the question whether impeachment by inconsistent statements opens the door to support by proving consistent statements. A few courts hold generally that it does. (Citations). Most courts, since the inconsistency remains despite all consistent statements, hold generally that it does not. (Citations) . . . "

Then McCormick discusses the exception to the rule, upon which exception "all courts agree":

" . . . But certain exceptions should be recognized. * * * If in the particular situation, the attack by inconsistent statement is accompanied by, or interpretable as, a charge of a plan or contrivance to give false testimony, then proof of a prior consistent statement before the plan or contrivance was formed, tends strongly to disprove that the testimony was the result of contrivance. Here all courts agree." (Emphasis in original).

In discussing the question of prior consistent statements, this Court, in Lindsey v. United States (1956), 237 F. 2d 893, 895, used the following language:

> "Appellee urges that notwithstanding the majority view which holds such evidence inadmissible, 140 A. L. R., supra, at 22, the better rule and, in the absence of applicable federal statute or Alaska precedent to the contrary, the correct rule -- the rule adopted by the trial judge to insure fair trial in the case at bar -- is that prior consistent statements are admissible to rehabilitate a witness who has been impeached by prior contradictory statements.
>
> "There is scant basis in reason or experience to admit such statements, except in cases where it affirmatively appears that the prior consistent statement was made at a time when the declarant had no motive to fabricate. Only then can such evidence be considered as having any reliable element of trustworthiness. (Citing cases)."

We agree with the prosecution that not only was an attempt made by appellants to discredit Leonard and his testimony, but that attempt was eminently successful (see argument under Points VIII and IX, App. Op. Br. pp. 72-77, and App. Op. Br., Appendix "B").

There can be no question in this case that the witness

Leonard was discredited. As we pointed out in our opening brief, Leonard had been discredited by all of the recognized methods of impeachment excepting conviction of a felony, and the evidence disclosed a flagrant effort by Leonard and his wife to obstruct justice, an attempt to commit extortion, and the solicitation of a bribe in the sum of $25,000.00 from one of the appellants in consideration of Leonard's leaving the country and not testifying as a witness in the trial of this case (Carbo Op. Br. p. 43). Leonard was the main witness for the prosecution; it was he who gave the principal evidence against Carbo with reference to the purported threatening telephone calls allegedly received by Leonard from Carbo. And now we find the prosecution contending that the hearsay declarations of this thoroughly discredited witness can be used -- not to show that he had no motive to fabricate, but that they bolstered and "corroborated" his testimony from the witness stand.

However, proof that Leonard had made prior statements consistent with the story he told on the witness stand could not be used, as the prosecution now asserts, for the purpose of "corroborating" that story; their use is confined to determining whether or not the witness is telling the truth on the witness stand; in other words, the jury can give that evidence such weight as it might be entitled to receive on the question of the witness' credibility, but such statements can not be used as substantive evidence that the contents of the statements are true. This rule is fundamental and needs no citation of authority to support it.

However, once more the prosecution finds itself in a dilemma, since, as we have demonstrated above, the prosecution offered this evidence upon the theory that Leonard was an "agent" of the appellants, and it was received by the Court upon that theory; and at no time in the trial court did the prosecution assert that it was relying upon the theory of "prior consistent statements". Under these circumstances, as we have pointed out above, the prosecution can not now, upon appeal, ask this Court to consider this evidence upon a totally different theory from that under which it was offered and received in the trial court.

D. Evidence of Anonymous Telephone Threats to Leonard (Reply to Appellee's Point VI, B, 6(a), pp. 252-254).

"State of mind" (Appellee's Br. p. 253) is a comfortable umbrella under which to rest when seeking to find justification for the reception of irrelevant, to say nothing of highly prejudicial and never connected-up, evidence. But in this instance the shade is not broad enough. 21/

The following occurred on the direct examination of Leonard, as a part of the Government's case in chief (RT 765-766):

"Q. All right. When was the next contact you

21/ Bracey v. United States, 142 F. 2d 85, 89-90 (CA DC 1944), cert. den. 322 U.S. 762, relied upon by appellee is not apposite. That case involved the question of evidence on rebuttal of similar conduct by the defendant charged. That has nothing to do with the factual situation we are now considering.

had with Mr. Palermo?

"A. The next one I believe was in the end of October or first of November, I had a message to call him.

"Q. From whom did you receive that message?

"A. From my wife.

"Q. And did you telephone Mr. Palermo?

"A. Yes.

"Q. And did you have a conversation with him? Just answer yes or no.

"A. Yes.

"Q. Have you received any sum of money from Mr. Palermo since May 20, 1959?

"A. No, sir.

"Q. Did you ever authorize anyone to contact Mr. Palermo in your behalf?

"A. No, sir.

"Q. Did you authorize your wife to contact Mr. Palermo?

"A. No, sir."

On cross-examination recordings were played of two telephone conversations between Leonard and Palermo, which Leonard stated accurately depicted the conversations (RT 1653, 1655) and which showed that Leonard had not told the truth on his direct examination quoted above. (Appx. B, attached hereto). Then on redirect examination of Leonard ensued the matter set

out in Carbo's Opening Brief pages 19-21 under Specification of Error 8.

We submit that the evidence admitted -- that Leonard was frightened by the telephone calls (RT 1663) -- was utterly irrelevant. State of mind had nothing to do with Leonard's testimony on direct examination that he did not authorize his wife to contact Palermo. (RT 766) That the evidence was highly prejudicial cannot be gainsaid. It can only serve to have had the jury believe that these defendants or some of them had made telephone calls between May 20 and November, 1959, which frightened Leonard. There was no evidence to this effect. Prosecution counsel himself said that he could "not ... show these defendants made these threats" (RT 1661). The evidence was completely improper.

Moreover, whether Government counsel calls it "state of mind" or not, the effect of this evidence is to suggest to the jury that it may be considered (and the court gave no limiting instruction) in connection with proof of the offenses charged in the Indictment; i.e. if defendants were trying to keep a prosecution witness from testifying, they must be guilty as charged and this long after the alleged conspiracy was ended. This is no more proper than is evidence of attempts to conceal the conspiracy after the conspiracy is ended. (Grunewald v. United States, 353 U.S. 391) This "attempt() to broaden the already pervasive and widesweeping nets of conspiracy prosecutions" will not be permitted. (ibid at p. 404)

The damage inflicted upon appellants was irreparable.

E. Other Irrelevant and Prejudicial Evidence (Reply to Appellee's Point VI, B, 7)

Appellee states (Br. 258) that "Carbo presents a potpourri of items which he says should not have been received against him, claiming these items were irrelevant and prejudicial". If the writer of the appellee's brief is referring to the collateral and irrelevant evidence introduced against appellant and which we set forth in f. n. 9 on pages 77-79 of our Opening Brief, he speaketh well, since that evidence is a shining example of the dictionary definition of "potpourri", viz, "a confused or heterogeneous mixture * * or hodgepodge".

Carmen Basilio

Appellee says (Br. 262) this evidence that Basilio saw appellant in a house in Miami between January 1 and January 14, 1959 corroborates Leonard's testimony that he saw Carbo in the Chateau Resort Motel in Miami on January 6, 1959. To reach the conclusion stated by appellee one would have to draw at least two inferences, one predicated upon the other, neither of which inferences would be reasonable, viz (1) that because Carbo was in Miami between January 1 and January 14, 1959, therefore he must have been in Miami on January 6, 1959; (2) that because he was seen in a "house" in Miami between January 1 and January 14, 1959, therefore, he must have been in the Chateau Resort Motel on January 6, 1959. To suggest that Leonard can thus be

corroborated is stretching the inference rule to absurdity.

Next appellee suggests (Br. 262) that Basilio's testimony showed a similar act of Carbo's in arranging meetings so that the other party would not know he was about to be confronted by Carbo. This certainly is no proof that Leonard saw Carbo in Miami. There is no evidence that Carbo made the call for De John to go over to Norris' house, and Basilio's testimony is that it was De John who suggested to him that they take a ride, and nothing was said about going to Norris' house. (RT 2835-6) But, even assuming that Carbo had arranged meetings so that, as appellee contends (Br. 262) "the other party wouldn't know he was about to be confronted by Carbo," that certainly would be no evidence tending to show that Carbo had attempted to extort money from Leonard or had entered into a conspiracy for such purpose.

Appellee speaks (Br. 263) of Carbo's exercising de facto though not de jure management control over the welterweight champion who was ousted from the championship by Don Jordan, and that such evidence was circumstantial evidence of Carbo's ability to tell Leonard through Palermo that "We are in for half the fighter of there won't be any fight." Appellee suggests (ibid) that (1) the fact that Akins' manager, Bernard Glickman, saw fit to discuss Akins with Carbo in 1957 and early 1958, was evidence of such de facto control. The record discloses that when Glickman was asked about those discussions and if they "involved the fight career of Mr. Akins" Glickman replied that

they did not, and when asked what they were talking about, Glickman replied "Mr. Carbo was a very good Dodger fan. He liked to talk about baseball too." (29 RT 4259--60) But, even had Carbo discussed Akins with Glickman, that would not show, without more, that Carbo had a de facto control over Akins. We take it that the record shows that Leonard and Nesseth had conversations with Glickman about Akins; according to appellee's argument, this would mean that they had a de facto control of Akins.

We suggest that appellee is hard pressed when it makes the contention (br. 263) that Glickman's $10,000 loan to Carbo, "without any evidence to protect him" was additional "circumstantial corroboration" of Carbo's control of Glickman. Of course, it is common knowledge that loans are made without collateral or without evidence of the indebtedness, and it is also common knowledge that such loans are paid. In this instance, the evidence shows that the $10,000 loan was repaid by Carbo (29 R. T. 4283) a fact to which the appellee failed to call this Court's attention. There is no evidence that the loan had anything to do with Glickman's boxing business or with his management of the fighter, Akins, and one would indeed have to indulge in fantasy to draw from the evidence in question here the inference that Carbo had a de facto control of the fighter, Akins.

Appellee again gives "wings to its imagination" when it suggests (Br. 263) that "More corroboration of Leonard" was supplied by Glickman's testimony that the $10,000 in currency

was picked up from him by a messenger who identified himself as "Mike"; that Abe Sands was identified to Leonard as "Mike" when he met Leonard at the Miami airport. The Leonard incident was in Miami in January, 1959; the loan transaction was in Chicago in 1957. There is nothing in the evidence to indicate that the person to whom the money was given in 1957 in Chicago was the same person who was supposed to have met Leonard in Miami in January, 1959, other than the fact that each was called "Mike". A pretty flimsy bit of evidence upon which to rely for the purpose of corroborating the testimony of a thoroughly discredited witness such as Leonard.

Marrone's Testimony

In referring to the testimony of the witness Marrone to the effect that he saw Carbo in a house in New Jersey and that Palermo's brother-in-law was there at the same time, and that the latter had in his possession a facsimile of the Western Union money order for $1,000 which had been sent to Leonard by Palermo in Daly's name, appellee argues that (Br. 263-264) it established that Carbo was in the Philadelphia vicinity, a month after the April 28th telephone calls purportedly made from Palermo's residence in Philadelphia; and that De John provided further corroboration of this fact when he testified he saw Carbo and Palermo together in an unidentified private house in Philadelphia in April or May, 1959.

Let us analyze this contention and the basis therefor.

The telephone calls were purportedly made in Philadelphia on April 28th and from a specific telephone located in Philadelphia - not anywhere else. (Exhs. 21, 22) The incident to which Marrone testified occurred took place not in Philadelphia, not even in Pennsylvania, but in the town of Audubon (RT 6499) which is in another and different state, New Jersey (ibid); and took place not on April 28th, nor even approximately near that date, nor even in the month of April, but in the month of May and the latter part thereof, the 29th or 30th, (RT 6499) more than a month after the purported telephone calls of April 28th. In short, appellee is saying that one can infer from the fact that Carbo was in New Jersey on May 30th, that he was in Philadelphia (in another state) over a month prior thereto, and thus could have made the purported telephone calls. We suggest that absurdity could go to no greater lengths.

We have a similar situation with reference to appellee's suggestion (Br. 264) that the witness "De John provided further corroboration" of the fact that Carbo was in the Philadelphia vicinity on April 28th when he testified that he saw Carbo and Palermo in a house in Philadelphia in April or May, 1959. (De John's actual testimony was: "Well, I was in Philadelphia, but I am not very sure if it was April or May, see." (RT 6577)) Here, we have the locale the same, that is, Philadelphia, but we find outselves a little short on time. In Marrone's testimony, at least, the time was fixed on May 30th, even be it a month after the occurrence which is the subject of the proof here, but with

De John, the testimony that it was "April or May" when he saw Carbo was of no value whatsoever -- it was neither fish, fowl nor good red-herring in so far as its being used as proof of Carbo's presence in Philadelphia on April 28th. We must qualify that last statement, however, and suggest that the prosecution found it to be a "good red-herring" for the purpose of diverting attention from the true facts.

In connection with this Marrone testimony appellee argues (Br. 2621) that "it provided circumstantial corroboration of the fact that Carbo and Palermo's plans to extort money from Jordan's managers initially included an attempt to win Leonard's confi - dence by sending him a $1,000 Western Union money order which enabled him to come to the Miami meeting."

Appellee's reasoning - if it can be termed that - on this subject, seems to be that Cori was a brother-in-law of Palermo's; that he was in the house with Carbo on May 30th; that he had in his possession a copy of the Western Union money order which had been sent by Palermo to Leonard in Daly's name some six months before; that therefore, this showed that Carbo and Palermo had attempted to win Leonard's confidence by sending him a $1,000 Western Union money order in Daly's name. All of this could be designated as plain and simple gobbledegook, if we may be permitted the use of an expressive term. Palermo was not present on May 30th; there is no showing that Carbo had anything to do with the Western Union money order; the fact that Cori had a copy in his possession is no proof whatsoever

that Palermo had sent it, nor any proof that Carbo had anything to do with its sending and no proof that he knew it had been sent. No connection was shown between Carbo and Cori, other than the fact that they were there together. All we have are two isolated facts, in no way related to each other: (1) the presence of Carbo and Cori in the same house; and (2) the possession of the copy of the Western Union money order by Cori, which facts considered singly, or together, could in no way lend support to the prosecution's contention that there was a plan by Carbo and Palermo to extort money from Jordan's managers and that it included an attempt to win Leonard's confidence by sending him a $1,000 Western Union money order.

The Incident at Goldie Ahearn's Restaurant on March 19, 1958

The prosecution contends (Br. 264) that the witness Bernhard's testimony relative to this incident

1. Was another excellent example of common scheme and plan;
2. Was additional evidence of Carbo's control of Akins' manager, Glickman; and
3. Was circumstantial corroboration of the fact that Palermo and Sica were knowing co-conspirators with Carbo, as well as another employee of the IBC, Billy Brown.

We will discuss the three phases of this contention seriatum -

1. Appellee does not provide us with any information

as to the "common scheme and plan" of which, so he says, this was another excellent example. We assume that the prosecution intends to convey the idea that there was a scheme or plan upon the part of the appellants here to extort money from Leonard, and that this evidence proves that there was such a scheme or plan. In other words, what the prosecution is saying is that this evidence shows an attempt by Palermo and Carbo to extort money from Viscusi. Of course, there are several answers to that: There is no testimony as to any "demand" (Appellee Br. 265) made by the speaker. Palermo said (RT 6520) "I told him we needed two grand right away and to send it up." There was no threat of any kind made by Palermo or Carbo, and we know nothing of what the party on the other end (presumably, Viscussi) said. There was nothing to show that there was any specific intent upon the part of Palermo or Carbo to extort any money from Viscusi. It is obvious that the whole matter was considered as a joke, since the testimony is that the group at the table laughed at Palermo's recital of his conversation. (RT 6521)

Bernhard was an officer with the New York Police Department and was present at the restaurant that night in the course of his official duties. (RT 6511-12) Had he believed that this was a bona-fide attempt to extort money from Viscusi, it seems to us he would have taken immediate action to see that the law was enforced and a prosecution had for the commission of a criminal offense. Of course, as the record will show, the prosecution did not produce Viscusi, the purported victim, as a witness to testify

as to this "attempted extortion."

2. We take it that the prosecution intends to assert that Bernhard's testimony as to Palermo's conversations with Viscusi was "additional evidence" (Appellee Br. 264) of Carbo's control of Akins' manager, Glickman. "Additional" presupposes that there is something already in the record to show that. This, we submit is not so, nor has the prosecution been able to point out anything to support that contention. In connection with this particular testimony, first, it does not show that Palermo asked for any money at the request of Carbo; and second, if it did, the fact that Carbo asked Viscusi to send him some money, that he needed it, would certainly be no evidence that he had control of Viscusi or Viscusi's fighter, Joe Brown, and less evidence that he had control of Akins' manager, Bernard Glickman, who was not involved in the matter in any way whatsoever.

3. Appellee asserts (Br. 264) this evidence was "circumstantial corroboration" of Palermo's and Sica's being known co-conspirators with Carbo, as well as another employee of the IBC, Billy Brown. Billy Brown gets into this conspiracy because he happened to be seated with Palermo and Sica in Goldie Ahern's restaurant; together with a number of other people, watching a prize fight on TV (RT 6521, 6528), and, according to appellee, was present when Palermo related his purported conversation with Viscusi, and according to the prose-

cution that shows that Carbo had control of Brown, who was the manager of the lightweight champion, Joe Brown.

And now we drag Sica in by the heels to show that he, as well as Brown, was a known co-conspirator, in assisting Carbo to control Billy Brown and his fighter, Joe Brown, the lightweight champion. Sica told Livingston, according to the record (RT 2331) as cited by appellee (Br. 265), the manager of the lightweight contender, Johnny Gonsalves, that he would try to arrange a title fight between Gonsalves and Brown for the title. The appellee does not, however, call this Court's attention to the fact that it was Livingston who wanted Sica to arrange the fight for him -- Sica was not seeking out Livingston and offering to get a title fight for Leonard's fighter. Livingston's testimony on this subject is as follows on redirect examination by the prosecutor (RT 2330-2331):

> "Q. Mr. Livingston, will you please tell us in your own words and to the best of your recollection the substance of the conversation between yourself and Mr. Sica?
>
> "A. Well, I was asked -- I wanted to get Johnny a title bout. He had been No. 1 contender for a long time and he needed a title fight if he ever wanted to get anywhere.
>
> "Q. You say 'for a long time'. What do you mean?
>
> "A. Well, Johnny has been fighting 17 years. He has been fighting pro 13 years, and he was No. 1

contender for five or six of those years. He beat three world's champions before they became champions and he had never got a shot at the title. A lot of people consider him a bad fighter, but you just don't beat fighters like that and become a bad fighter. And if they say that he looks bad on TV, I have seen a lot worse on TV.

"But, besides that, the only way you can get a title fight, which almost anybody knows, --

"Q. Well, --

"A. O. K.

"Q. -- just tell us what the conversation was with Mr. Sica.

"A. Well, we -- I -- we asked Mr. Sica if he could arrange a title fight for John. He was doing us a favor. He said he would have to go to Miami to try to arrange it and it would cost a thousand dollars expense money and he would see what he could do and we would have to give up 15 points off the fighter.

"Q. What is 15 points?

"A. 15 per cent of the fighter.

"Q. To whom?

"A. I don't know. He didn't mention no names. But that is the only way you get a title fight."

The testimony is not, as the appellee states (Br. 265), that the 15% of the fighter was to go to an "unidentified person located

in Miami". Sica said he would have to go to Miami to try to arrange it -- he did not say that the 15% would go to someone "located in Miami" -- and even if he had stated that, the fact that Leonard says he saw Carbo apparently residing in an apartment in Miami would be no proof that the so-called unidentified person who was to receive the 15% was Carbo. (The testimony as to the apartment [RT 645] does not reflect that Carbo was "apparently" or otherwise residing there; and it seems passing strange that the prosecution which throughout the trial and throughout its brief on appeal here forcefully intimated that Carbo had no residence and no roots, now finds itself conceding - for its own purposes, of course - that Carbo was residing in an apartment in Miami.)

And now we arrive at the perfect non-sequitur.

1. Since Brown's manager lived in Houston; and
2. Sica said arrangements for a fight between Gonsalves and Brown's fighter, the lightweight champion, had to be made in Miami (the testimony was that Sica said he would have to go to Miami to try to arrange it [RT 2331]); and
3. Since the price of a chance to fight for the title was the same 15% that was demanded by Carbo and Palermo from Jordan's purses (Appellee's transcript reference [Br. 265; RT 2331] says nothing about any demand by Carbo -- and when appellee speaks of the "same"

15% we assume that he means, not that it was the identical 15%, but that the percentages were the same).

Therefore, says the appellee (Br. 265), "it seems clear that Sica was acting as Carbo's shakedown emissary in loco Palermo." If that conclusion seems "clear" to appellee it is either viewing this evidence with rose-colored glasses, is suffering from myopia, astigmatism and kindred diseases of the eye, or is completely lost in a world of fantasy which it has created out of a vivid imagination.

The fact that Brown's manager lived in Houston does not mean that he remains there at all times, particularly when he is managing the lightweight champion and other fighters, whose activities are certainly not confined to Houston.

Because Sica said he had to go to Miami to make arrangements for the fight, does not mean that he was dealing with Carbo; and there is no evidence that Carbo was to be or was in Miami at that time. Carbo's name does not enter the picture in any way whatsoever in the conversation Sica had with Livingston when the latter was seeking Sica's aid.

And even assuming for the purpose of discussion this point, that Carbo and Palermo had demanded 15% from Leonard for Jordan's title fight with Akins, what connection could there possibly be between that fact and the fact that Sica said that Livingston would have to pay 15% in order to obtain a title fight for his fighter?

In other words, if anyone endeavored to arrange a title fight between Gonsalves and the lightweight champion Joe Brown, on the understanding that Livingston, the manager of the challenger, would give up 15% of the fighter, the mere fact that the percentage was the same as that purportedly demanded of Leonard for the Jordan-Akins fight, would make that person a conspirator with Carbo and Palermo and would show that that person was acting as "Carbo's shakedown emissary in loco Palermo." The mere statement of that argument discloses its own refutation.

More irrelevance is disclosed by Appellee's reference (Br. 265) to the witness Bernhard's overhearing of a conversation between Carbo and Palermo about a dinner which Palermo wanted to attend. Carbo told Palermo he would be able to attend it. Evidently, according to the record (RT 6526), Palermo was at the dinner; whether through Carbo's aid or otherwise is not disclosed; but what is the difference? What does all that prove in so far as any issue in this case is concerned? According to the record, the dinner was given by the Chicago Boxing Writers and Broadcasters Association (RT 6545). Men of standing and importance in the boxing world and in the sports division of leading newspapers were present, including (RT 6545-6550) James Norris, President of the I. B. C., Monsignor Kelly, Director General of the Catholic Youth Organization, the Mayor of Chicago, Frank Gilmer, chairman of the Illinois State Athletic Commission, representing the Governor of the State, the boxing

champions in various divisions, including, Ray Robinson and Carmen Basilio, Truman Gibson, Jr., one of the appellants in this case, and many others. Tickets were at a premium (RT 6550). So Palermo, who has been in the boxing business for years and has managed champions, is present at a dinner attended by the aforementioned person. Under the prosecution's reasoning, some of these persons should be charged with these conspiracies, since they were present on that occasion at the same dinner at which Gibson and Palermo were guests. There would be just as much basis for that as there is for making Sica an emissary of Carbo's in connection with the Livingston-Gonsalves incident.

Finally, we have Bernhard's testimony about overhearing Carbo tell the group at the table:

> " . . . 'I have troubles -- I got this trouble straightened out. Now I got more trouble. I got his contract. He is my fighter. I spoke to Glickman about it so don't worry.' " (43 R. T. 6525)

Appellee says (Br. 266) that this remark was made two days before Akins fought Logart in an elimination bout for the selection of a new welterweight champion. Appellee does not say so, but we take it that there was some connection between the remarks and the fact that Akins fought Logart. We suppose the appellee interprets the statement (RT 6525) "I got his contract. He is my fighter." as referring to Glickman's fighter Akins, but there is nothing in the statement to indicate that; and the fact

that those remarks were prefaced by the statement (ibid) "Now I got more trouble." would certainly indicate that it was not Akins who was the subject of the conversation, since, according to the prosecution Akins was controlled by Carbo, and that, if true, would mean not trouble for Carbo, but money.

Appellee also asks (Br. 266) us to note, with interest, that when Akins defeated Logart in the fight just mentioned, he then faced another Carbo-controlled fighter in the final elimination bout for the title: Vince Martinez, who was managed by Daly. The transcript references used by appellee in this connection (13 RT 1937; 21 RT 3064) do not support appellee's bald statement that Vince Martinez was a "Carbo-controlled" fighter. There is nothing in the testimony referred to by the appellee to warrant his making such a misleading and unwarranted statement to this Court; nor is there any support for such a statement in any other part of this record - had there been, appellee would surely have called attention to it.

With reference to the Weill incident about which appellant complains (Carbo Op. Br. 78), appellee's reply is (Br. 258) that the entire transaction was injected into the case by appellant and not by the prosecution. Here again appellee is in error.

Appellee says (Br. 258) that Carbo's counsel "suggested to Leonard that Leonard made an offer to Carbo to give Carbo half of all his fighters if Carbo would allow the lightweight champion, Joe Brown, to fight an unidentified opponent." (Emphasis added). Once more, appellee indulges in a distortion of the facts, and a misstatement

of the record. There was nothing in that conversation to the effect that Carbo would "allow" Joe Brown to fight, nor was there anything there indicating that the opponent was unidentified; on the contrary, Jordan was specifically identified as the opponent (RT 1456-7).

This is what actually happened: Appellant's counsel asked Leonard if at that time he did not tell Carbo that he would give him half of all of his (Leonard's) fighters if Carbo could get Jordan a fight with the champion Joe Brown (RT 1456-7). Leonard denied making that statement (RT 1457). Nothing was asked of Leonard concerning any purported conversations between Carbo, Weill and Leonard. But on redirect examination, the prosecution was permitted, over appellant's objection (RT 1671a-1672), to introduce the collateral and irrelevant matter which forms the basis of appellant's claim of prejudicial error. The claim by Leonard was that (RT 1671a) he had been put "on trial" by Carbo and had been told by Carbo that he should use Gambina's fighter and Weill's fighters if he, Leonard, "expected to use any big name fighters out there" (RT 1672). This testimony was plainly prejudicially irrelevant; it was not related to nor based upon anything to which Leonard had testified on his cross-examination. As we have pointed out, the only question asked of Leonard on his cross-examination was whether he had told Carbo he would give Carbo half of his fighters if Carbo could get Jordan a fight with the champion, Joe Brown, which Leonard denied (RT 1456-7). Appellant, upon Leonard's denial, could, if

he so desired, adduce testimony to refute that denial; but, under no rule of law of which we are cognizant, could the prosecution on redirect examination, properly introduce such testimony as was permitted to be received in evidence here. (Ballew v. United States, 160 U.S. 187, 192-193; United States v. Corrigan, 168 Fed. 2d 641, 645 [CCA 2, 1948]; Gordon v. Robinson, 210 Fed. 2d 192, 195 [CA 3, 1954]).

The Weill incident occurred in March, 1958. The prosecution does not contend that the conspiracies charged here were in existence at that time, nor at any time before the time charged in the indictment. Now appellee says (Br. 261) that appellants Gibson and Carbo "had confederated on occasions prior to the time that Jordan became the top welterweight contender, when Carbo desired to apply pressure to Leonard." (emphasis added) In other words, appellee seeks to prove other conspiracies. This it is not permitted to do (Kotteakos v. United States, 328 U.S. 750, 758, 769). Additionally, if such an incident as described by Leonard had taken place on March 15, 1958, it could not have been proof of any conspiracy between Carbo and Gibson, since Carbo is the only one who was supposed to have made the statements to Leonard; and the only connection Gibson is supposed to have had with the transaction is that he was asked by Leonard where he could locate Carbo. (RT 1670).

Appellee's reliance (Br. 261-2) upon Judge Hand and United States v. Dennis, 183 Fed. 2d 201, 231 is misplaced. What Judge Hand was referring to in the quotation cited by appellee was

declarations made in connection with the same conspiracy. As we have pointed out, appellee is not claiming that the Weill incident was part of the conspiracies charged in the indictment; appellee contends it was evidence of a separate conspiracy between Carbo and Gibson (Appellee's Br. p. 261).

If it be contended that this conversation shows a similar offense, our answer is that it is obvious that there is no similarity between the Weill incident and the charges of conspiracy to extort, attempted extortion, and extortion which form the bases of the indictment in this case. While it is true that there are exceptions to the general rule that evidence of a separate and distinct offense is not admissible in proof of the one charged, the general tests of the admissibility of evidence under such exceptions are: 1. Is it part of the res gestae? 2. If not, does it tend logically, naturally, and by reasonable inference to establish any fact material for the prosecution, or to overcome any material matters sought to be proved by the defense, or does it help to disclose motive, intent, premeditation, guilty knowledge, malice, or a common plan or scheme (20 Am. Jur. §310, et seq., p. 289, et seq., 22 CJS, §683, et seq., p. 1089, et seq.; Wigmore on Evidence, Vol. II, Ch. VII, p. 191, et seq.).

This rule is not an open sesame to evidence of other alleged offenses by the defendant in a criminal trial. On the contrary, our Courts have emphasized that the direct relevance of the evidence to facts material to the crime charged must be clearly apparent before it will be admissible. Otherwise, it must

be excluded, since it is highly prejudicial. Indeed, in cases of doubt as to relevancy, the doubt must be resolved in favor of the accused, and the evidence excluded. (Ibid)

Applying these rules to the question at issue here, it is clear that the Weill incident could not assist in proving motive, premeditation, guilty knowledge or malice, since none of those matters was in issue here; and that testimony certainly would throw no light upon the specific intent which is necessary in the crimes of conspiracy to extort and extortion, the offenses charged in the indictment. A comparison of the evidence adduced in connection with the Weill incident with the evidence received in connection with the conspiracy and extortion charges found in the indictment, makes this crystal clear. And the same comparison will show that there is no showing of a common plan or scheme which would warrant the introduction of the testimony of which we complain. The Carbo statement to Leonard in March, 1958 that he should use Weill's fighters is not an "extortive demand" upon Leonard, as appellee describes it (Br. 260); there was no element of extortion in Carbo's conversation with Leonard at that time, and nothing remotely indicating that Carbo was seeking to control any of Leonard's fighters, as is the prosecution's contention with reference to the charges in the case at bar.

The testimony of which appellant complains was not part of the res gestae, nor did it tend logically, naturally, and by reasonable inference to establish any fact material for the

prosecution, or to overcome any material matter sought to be proved by the defense. It should not have been received; that its admission was prejudicial to appellant is manifest.

It might not be amiss here to point out that the thrust of appellee's argument here is an attempt to uphold its position and that of the trial court, by citing the most general of principles without attempting to reckon with the actual facts of this case. We submit that cases on appeal are not to be subjected to such a process of truncation so that they may fit only a limited number of standard procrustean beds formed by the prosecution. The incantation of general rules of law does not prove that error has not been committed or that appellant has had a fair trial.

V

THE MOTION TO DISMISS COUNTS VII AND IX BASED ON FAILURE TO ALLEGE VENUE THEREIN SHOULD HAVE BEEN GRANTED (Reply to Appellee's Point VI, A, 3(b); pp. 171-177)

We do not understand appellee's argument (Br. 174-175) about waiver. Appellant did not waive his venue point; he moved to dismiss before trial (CT 426, 159, 164).

Nor do we understand appellee's apparent argument (Br. 171-172) that because the method of raising a defective allegation as to venue, before the change in the Federal Rules of Criminal Procedure, was by way of demurrer, therefore decisions before

the change holding an indictment bad for failure to allege venue are not applicable now. 22/ That an indictment which improperly alleges venue is subject to a motion to dismiss cannot, we submit, be gainsaid. Rule 12(b) specifically provides that defects which were formerly reached by demurrer are now to be raised by motion to dismiss. And Blackmar v. Guerre, 342 U.S. 512, 514, specifically holds that a complaint which improperly alleges venue is subject to a motion to dismiss. Though Blackmar is a civil case, the Federal Rules of Civil Procedure (Rules 7[c], 8[a] and 12[b] and [h]) are to this extent - simplified statement of claim, abolition of demurrer, defenses to be presented by motion, defenses waived if not raised -- the same. For a criminal case, after the adoption of the Federal Criminal Rule, granting a motion to dismiss for failure to properly allege venue, see United States v. Richman, 190 F. Supp. 889 (D. Conn. 1961).

We believe the District Court decision in United States v. Weishaupt, 167 F. Supp. 211 (ED NY 1958), relied upon by appellee (Br. 173) was erroneously decided. Significantly, the court cites no case in support of its ruling, and the case is directly contrary to what the Supreme Court said in Knewel v. Egan, 268 U.S. 442, 446, a habeas corpus case cited by appellant. (Carbo Op. Br. 66) and not commented upon by appellee.

It is a startling innovation in the law, we submit, in the light of the Sixth Amendment, to say, as the appellee indeed does,

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22/ Incidentally, appellee fails to note the cases cited in Bratton v. United States, 73 F. 2d 795, 798, upon which Bratton relied.

that an Indictment need not allege venue. What might have ensued, had the trial court granted the motion to dismiss, as it should have, whether the Government would have amended, whether Counts VII or IX should have been transferred to another district for trial, etc., is beside the point here. Appellee argues that an indictment which fails to allege venue (and it is not to be forgotten that each count in an indictment is treated as, and is, a separate indictment [Murphy v. United States, 133 Fed. 2d 622, 627 (CA 6 1943)]) is a proper indictment. We submit this is not so. We submit that an indictment is defective which fails to allege venue, that such an indictment is subject to a motion to dismiss and that the district court's failure to grant the motion will be reversed on appeal. (Knewel v. Egan, 268 U. S. 442, 446).

VI

THE CONDUCT OF THE TRIAL

In addition to other things which occurred at the trial (e. g. Points IV, C, D, and E, supra), the Court's and the Prosecuting Attorney's conduct denied appellant a fair trial.

A. The Questioning of Carbo's Counsel During Summation (Reply to Appellee's Point VI, B, 12, (d), pg. 303)

Appellee's argument under this point overlooks the record and misses the point of appellant's complaint.

In the first place, appellee overlooks the fact that the trial court had ordered the attorneys not to interrupt another attorney's argument even though they thought he was "misquoting the evidence" (RT 6816). Accordingly, when the court violated its own rule (we would suppose the purpose of his ruling was, as stated (ibid), so there would be no interruption and when it came time for argument the error would be pointed out), it immediately conveyed to the jury that counsel was misquoting the evidence.

Secondly, the very question asked by the court, more than suggests, it frankly states, that counsel was misquoting the evidence. ("Mr. Beirne, what evidence is there in the record that he lived in Miami, Florida and made his home there for ten years?" [RT 7283]).

But the most important and damaging part of this colloquy, if we are going to afford defendants the right to a jury trial, is that after Carbo's counsel replied that defendant Palermo so testified (ibid), the Court's reply (ibid), "You are drawing on the testimony of Palermo?" is tantamount to an instruction that such testimony was not to be believed. We can conceive of few things more incorrect or prejudicial.

And appellee, in its quotation of some of Palermo's

testimony following its statement (Br. 303) that "the trial court was quite charitable," is even now implying, if not actually saying that Carbo's counsel was indeed misquoting the evidence. Appellee is mistaken. The record shows that Palermo testified (RT 6209):

"Q. Do you recall watching that fight on television and being in the same room with Mr. Carbo and Gabe Genovese?

"A. I don't remember because Carbo lived in Miami. I have seen Carbo quite a few times.

"Q. Where did he live in Miami, sir?

"A. I was never to his home. He lived -- I know he lived in Miami for the last ten years."

Appellant was entitled to be tried before a jury that was permitted to make up its own mind.

B. The Appellant was Denied a Fair Trial (and, Hence Deprived of Liberty Without Due Process of Law in Violation of the Fifth Amendment) Because the Prosecution "Allowed False Evidence to go Uncorrected" 23/ (Reply to Appellee's Point VI, B, 12(c); pg. 302).

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1. The following testimony of Leonard, with respect to his attempt to secure $25,000 from the defendant Palermo, in return for his not being a witness in this case against the

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23/ The phrase is from Napue v. Illinois, 360 U.S. 264 at p. 269 (See Appellant Carbo's Opening Brief, p. 44).

defendants, 24/ was false: 25/

a) Leonard's testimony, elicited by the prosecution, on direct examination of Leonard, as a government witness, that he had never authorized his wife (Jeanne) to contact the defendant Palermo in Philadelphia (6RT 766).

b) That he had told his wife, in Los Angeles, before she left for Philadelphia (the home of the defendant Palermo) not to talk to Palermo (8 RT 1054).

c) That he did not know his wife was in Philadelphia (8 RT 1030; 10 RT 1483).

d) That he told her he didn't want to have anything to do with securing $25,000 from Palermo (8 RT 1033).

e) That he didn't want his wife in Philadelphia talking to Palermo (8 RT 1033, 1054).

f) That he did not discuss with his wife, before she went East, a plan by which he would obtain money from the defendants (9 RT 1262).

g) That in a telephone conversation with Palermo:

24/ See Carbo's Opening Brief, Appendix "B", pp. 16-20, for more detailed references.

25/ We shall point out later, infra at pp. 90-92, the bases for our assertion that the testimony was false; additionally, in Appendix "C", in columnar form, we set forth, for the convenience of the Court, Leonard's testimony, and the demonstration of its falsity in specific instances.

(1) he did not tell Palermo that he wanted to go back East and talk to him (8 RT 1044);

(2) that he did not ask Palermo for money to go to Philadelphia (8 RT 1044);

(3) that he did not say to Palermo that two witnesses had already been served with subpoenas to appear in the trial of this case (8 RT 1037).

2. The falsity of the foregoing is thus proved:

A. Palermo made recordings of the telephone conversations referred to. 26/ Those recordings demonstrate to a certainty that:

(a) Leonard knew (through a telephone conversation he had prior thereto with his wife) that she had asked for $25,000 (Appendix "B", p. 5).

26/ The tapes are in evidence, as Exhibits C, D and E (21 RT 3059); the conversations were played to the jury (ibid and RT 1652-3, 1655). Because of difficulty in making a transcript of them, the trial court did not require that they be reported and transcribed (RT 1570). Major portions of the recordings were called to the attention of the jury, during final arguments, and appear at 47 RT 7176-7180; portions are also referred to in Carbo's Opening Brief, Appendix "B", pp. 16-20.

For the convenience of the Court, we annex as an Appendix "B" a complete transcript of the recordings received in evidence, prepared for our own use from Exhibit E, which is a clarified copy made from the actual recordings, Exhibits C and D (RT 1643-44). We assume if appellee deems our version of them to be inaccurate in any respect it will call the inaccuracy to the attention of this Court.

(b) Leonard was phoning Palermo because his (Leonard's) wife had told him to (Appendix "B", p. 1).

(c) Leonard said, at the very beginning of the first telephone conversation that he "think(s) that something can be done. . . . if I can get back there and talk to you" (Appendix "B", p. 1). and Leonard asked "Where do you want me to come to?" (ibid), stating "it can be anywhere". (Appendix "B", p. 2).

(d) Leonard asked Palermo to pay his fare: "soon as I can get a flight or you send me some dough" (Appendix "B", p. 2).

(e) That when asked by Palermo, "What do you want", Leonard replied "I'll talk to you when I get there. You know." (Appendix "B", p. 4).

(f) Leonard's response to a query by Palermo: "You know what your wife said", was "Yeah"; then Palermo said "Twenty Five Big Ones" ($25,000), to which Leonard responded, "I can talk to -- as soon as I get there I'll talk to you" (Appendix "B", p. 5).

(g) Indeed, in the early part of the conversation, when Palermo asked "What's on your mind", Leonard expressed his desire for

the money (and his false solicitude for the well-being of the defendants and their families) with the reply: "I think you know what the hell it was. . . . What the hell, I don't want to see anybody go to jail. Everybody has got families." (Appendix "B", p. 1).

(h) Leonard stated to Palermo that they had already started serving subpoenas; and had served Jordan and McCoy (Appendix "B", p. 8).

B. On cross-examination, Leonard finally admitted (RT 1265) that he was willing to accept $25,000 from Palermo.

Faced with the foregoing, with Leonard stripped of integrity and denuded of probity, the prosecution made the following statements to the jury in the final arguments:

(a) "There would seem to be no question that they had talked about this before she went and that they had decided that if Mrs. Leonard obtained a sum of money or promise of a sum of money that Leonard would attempt to leave the country. I don't think there is any doubt of that." (RT 7055).

(b) "It's true Leonard's wife had contacted Palermo in Philadelphia, but that had fallen through." (47 RT 7060).

(c) "And they ask you to condemn Jack

Leonard because Leonard lets his wife go to Philadelphia." (49 RT 7546).

(d) " . . . Leonard would have apparently been willing to accept the $25,000.00 and to attempt to leave the country, in order that he would not have to testify in this case." (RT 7056).

(e) " . . . Leonard's plans to obtain money were not so well made that he was ready to go to Philadelphia and get it . . . " (47 RT 7060; emphasis ours).

3. The foregoing testimony (supra, pp. 89-90) was known by the prosecution to be false. 27/

a) After the introduction into evidence, and the playing of the recordings, and after the cross-examination of Leonard, the falsity of his testimony became so patent, we suggest, that even the prosecution saw it.

b) The statements made by the prosecution to the jury, quoted above, would not have been made, if the Government did not deem Leonard's testimony false -- although we concede, the prosecutor did not tell the jury that the evidence was false.

27/ We are not asserting that the prosecution knew the evidence to be false, when it first elicited it, from Leonard, on direct examination -- his testimony that he did not authorize his wife to contact Palermo (6 RT 766).

4. The prosecution did not fulfill its obligation of correcting the false evidence. 28/

That duty was two-fold: to do so before both triers of fact below, both before the trial court and before the jury.

a) Before the Trial Court.

On the Appellants' Motion for New Trial, and Supplemental Motion for New Trial (see Carbo's Opening Brief, pp. 42-43), one of the central issues was the credibility of Leonard, the Government's principal witness.

To the trial court, then sitting as a "thirteenth juror", who had the duty of weighing the evidence and determining the credibility of witnesses, 29/ the prosecutor represented unequivocally (51 RT 7950) " . . . Leonard was completely truthful." 30/

Had the Government conceded that Leonard had given false testimony, on as important a matter as to whether he was willing to sell his testimony for money, Judge Boldt would, in our view, have ruled, pursuant to Rule 25, that he was in no position to adjudge the credibility of the Government's main witness, and hence,

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28/ "The same result (as the knowing use of false evidence) obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Napue v. Illinois, 360 U.S. 264, 269.

29/ Judge Boldt had not heard the testimony; hence he did not observe the demeanor of any witness.

30/ The prosecutor made no statement similar to those made to the jury, supra, at pp. 92-93.

would have granted the Supplemental Motions for New Trial.

b) Before the Jury.

Either before, or, minimally at the final arguments to the jury (all of the evidence being concluded), it was the obligation of the prosecution to apprise the jury that the portion of Leonard's testimony heretofore discussed (supra, at pp. 89-90) was false; 31/ and to so advise the jury in language clear, unequivocal and unambiguous.

Instead, the prosecution satisfied itself 32/ by a process of double-talk; first, ambivalent intimations of falsity, to which we have adverted (supra, at pp. 92-93), then negating these by unqualified asseverations of Leonard's total credibility and honesty -- which we now cite:

1) That the prosecution was requesting the jury to accept Leonard's testimony, whether or not there was any evidence corroborating him (46 RT 6827).

2) That nothing offered by the defense had impeached Leonard (46 RT 6827).

31/ The Government called Leonard its "principal witness" (51 RT 7962).

32/ But not the commands of the Constitution; nor the rudimentary requirements of fair play.

3) That Leonard was not a perjurer (49 RT 7529).

4) That Leonard was basically honest (46 RT 6943).

5) That he was not motivated by greed or profit (46 RT 6902).

Moreover, that the prosecutor never intended to say, or intended the jury to understand him to say, that Leonard's testimony was false in any respect, is demonstrated by the following representations to this Court by the prosecution (Appellee's Brief, p. 302):

"The Government at no time characterized Leonard's testimony as 'false' in any respect and, as a matter of fact, it is the Government's position to this day that Leonard testified fully, truthfully, courageously, and to the best of his ability, and that he did not knowingly lie or distort in any aspect of his testimony. . . . " (Emphasis ours).

VII.

APPELLANT ADOPTS IN SO FAR AS APPLICABLE TO HIM THE POINTS MADE IN THE REPLY BRIEFS OF THE OTHER APPELLANTS HEREIN.

CONCLUSION

The judgments should be reversed.

Respectfully submitted,

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APPENDIX "A"

INSTRUCTIONS FROM UNITED STATES v. SCHNEIDERMAN, 106 F. S. 892, 903 (S. D. Cal. 1952)

" . . . [T]he jury will be instructed substantially as follows:

"In your consideration of the evidence you should first determine whether or not the conspiracy existed as charged in the indictment. If you conclude that such conspiracy did exist, you should next determine, as to each defendant, whether or not he or she was knowingly and willfully a party to or member of the conspiracy.

"In considering whether or not a particular defendant was a member of the conspiracy, you must do so without regard to and independently of the statements or declarations of others. That is to say, you must determine the issue as to the conspiracy membership of a particular defendant from any evidence as to his or her own statements or declarations and acts or conduct.

"If you find that the alleged conspiracy did exist and that all or any of the defendants were members of such conspiracy as charged, you should then determine whether the alleged club chairmen, teachers and others mentioned in the testimony, but not named as defendants in the indictment, were knowingly and willfully members

of the conspiracy during the period of time covered in the indictment. In this determination, as in the determination of the conspiracy membership of any defendant, only the statements or declarations and acts or conduct of the person whose membership is in question, and not the statements or acts of others, may be considered.

"If and when the existence of the conspiracy charged in the indictment and the membership of all or any of the defendants in such conspiracy has been found, then the acts thereafter done and the statements or declarations thereafter made by any person found by you to be a member of the conspiracy may be considered in connection with the case as to any defendant whom you find to have been a member of the conspiracy, even though such acts and declarations may have been made in the absence and without the knowledge of such defendant, provided such acts were done and such statements or declarations were made during the continuance of such conspiracy and in furtherance of an object or purpose of the conspiracy.

"So if you conclude from the evidence that a defendant was a member of the conspiracy, you may then consider as if made by him or her any statements or declarations of other members of the conspiracy, including other defendants who you may find were

members of the conspiracy, provided such statements or declarations were made during the existence of the conspiracy and in furtherance of an object or purpose of the conspiracy as charged in the indictment. But otherwise any admission or incriminatory statement made outside of court by one defendant may not be considered as evidence against another defendant not present when the statement was made."

APPENDIX "B"

TELEPHONE CONVERSATIONS BETWEEN
PALERMO AND LEONARD
(From Defendants' Exhibit E)
(P = Palermo L = Leonard)

November 6, 1959

P: Hello

L: Hello

P: Jack, How are you?

L: Yea, What's doing?

P: Not much.

L: Talked to party yesterday. She said I should call at 8 tonight. Tough talking on the damn phone, though.

P: Uh-huh.

L: Think that something can be done. You know, what the hell, if I can get back there and talk to you.

P: Well, what's on your mind?

L: Well, I think you know what the hell it was. Either I sign an affidavit, or something. What the hell I don't want to see anybody go to jail. Everybody has got families. You know.

P: Uh-huh. What will you do?

L: Where would you want me to come to?

P: Where do you want?

L: Well, doesn't make too much difference to me. Only thing is my father is sick. That is the only reason I mentioned Arkansas. He's sicker than hell down there. I could kill

two birds with one stone.

P: Why Arkansas?

L: I mentioned Little Rock. He's in Hot Springs, in the hospital.

P: Why Arkansas?

L: Huh?

P: Why Arkansas?

L: Like I said, the only reason I mentioned there, my father's sick. I could kill two birds with one stone. While taking care of this, I can stop in and see him. But it don't have to be there. It can be anywhere. I could go on from there wherever I go.

P: It's too far.

L: Well, where would you want me to come to Pittsburgh? Anywhere. I don't care wherever the hell you want me to go.

P: Uh-huh.

L: Doesn't make any difference. What the hell, as long as I, you know, I don't want to go into Philadelphia.

P: When?

L: Soon as I can get a flight or you send me some dough. I no dough to get back to you. I can get a flight out tomorrow, I guess, or Sunday morning. As soon as I can get a flight out of here.

P: I see. When will you get the flight?

L: Well, I don't know. I haven't even checked any flights, cause I didn't know, you know, I can check a flight and see

what the hell flight I can get on. Where would you want me to --

P: What place do you suggest?

L: Well, hell, I don't know anything about the country back there. I have never been anywhere, you know. I have never been in Pittsburgh in my life. I have never been to any of those other places.

P: I'd see you any place. I wouldn't be afraid to see you.

L: What the hell, I don't want to come in to Philly.

P: I wouldn't care who saw me. Why not Philadelphia?

L: Well, hell, I don't know, the only thing there are too God damn many people watching all the time.

P: I wouldn't care who saw me. I am allowed to talk to you.

L: O. K. I will come in there, it doesn't make any difference to me.

P: Course, all you got to do, you know, tell the truth. We don't have to be afraid.

L: Only thing is, I have already made, you know, affidavits. And I've got to know what the hell I'm doing. So if you want to talk, well I'll come back and talk.

P: Of course, you and I, I mean your friends.

L: What do you want me to do?

P: What day do you want to do it?

L: Any time you want me to come back, I'll be there.

P: It will be up to you.

L: Well, I mean, uh, I can come in any time.

P: It's what you want. What's on your mind? What do you want?

L: What?

P: What do you want?

L: Well, hell, I'll talk to you when I get there. You know.

P: What do you want to do?

L: I'll talk to you when I get there.

P: Sunday?

L: Yea. I could be Sunday if you want me to come back Sunday.

P: Where at?

L: Christ, any where you want, I don't care.

P: Philly?

L: Any place you want where it will be easy on you.

P: Would you want to come to Philly?

L: Well, hell, I don't want to, but I will. You know.

P: I see. I'm just trying to think. O. K. Sunday will be all right.

L: O. K. Well, how in the hell am I going to get the ticket or the dough or something?

P: Can't you get that back there?

L: Christ no. I have been borrowing from this guy. I've been borrowing to live on for Christ sake. Truman's got me black-balled everywhere; I can't move.

P: Who?

L: Truman's got me black-balled so much I can't move. Some

guy was going to get me a job. First thing he says, no, he says, Truman won't give me any shows if I do.

P: How much money will you need to come in?

L: Huh? Just the ticket. What the hell I need?

P: Just the ticket?

L: Yeh.

P: You know what your wife said?

L: Yeah.

P: 25 big ones.

L: I can talk to -- as soon as I get there I'll talk to you.

P: Uh-huh, well how much will you need for the fares, you know, to come in?

L: Well, I don't know what the hell they are. What are they?

P: You just need the fare money?

L: Yea. What the hell will I need when I get there, $20.00? or something -- enough to stay all night, or something?

P: Where would you want it sent?

L: Well you can have her send it, or you can send it. Send it right directly to the house. I don't give a shit. You can give it to her and have her send it. It don't make any difference to me.

P: Give it to her and have her send it. Is that what you want?

L: Yea. You can give it to her and she can send it right to the house.

P: I'll give it to her.

L: O.K.

P: That's what you want?

L: Yea.

P: You want to call me Sunday?

L: Yea. What time?

P: Well let's see, say 7:30.

L: 7:30 in the morning?

P: Your time.

L: 7:30 our time, be 10:30 your time.

P: Yea.

L: At this same number?

P: Yeah.

L: O.K. I'll call you at 7:30, but if you want me back there, get in touch with her and get the dough here. You know.

P: Yeah.

L: In that way I'll go ahead and make a reservation tomorrow morning or tonight.

P: Uh, huh.

L: So, I'll hang up. I'm running out of change anyway.

P: Make it 9:30 your time.

L: 9:30 our time.

P: Right.

L: Yeah, 9:30 my time.

P: Yea, listen. Alright, make it 9:30 your time.

L: O.K.

P: Right. Bye.

P: Hello.

L: Hello. What's doing?

L: You know what's doing.

P: What's going on?

P: What's going on up there?

L: Nothing. Christ - nothing at all.

P: I can't hear you.

L: What?

P: Talk a little louder.

L: It's as loud as I can talk.

P: O. K.

L: Turn the machine off and you can hear me.

P: Huh?

L: Turn the machine off and you can hear me.

P: Turn who off?

L: Turn the bug off and you can hear me better.

P: Oh, you kiddin'? Did you talk to your wife and get my message?

L: Yea. She wanted me to come in Wednesday and then she said no. And I don't know what the hell's going on.

P: Well she was supposed to meet me today and didn't.

L: She's sick as hell. She went to the doctor's and got a shot this afternoon.

P: Yeah, she said she was sick.

L: Yeah, she was sick as hell. When she called me she could hardly talk.

P: She wanted me to bring the money up there. I'm not going up there.

L: No, I don't blame you. I mean, well, did you want her to come up there, or what?

P: I'm not gonna do that.

L: No, hell no.

P: Do you want to see me? I'll talk to you.

L: Uh, huh. Well I don't know, whether you want to do it or want to see me or not, you know, uh. They started handing subpoenas out here yesterday, you know.

P: Huh?

L: They started handing subpoenas out here yesterday.

P: Uh, huh.

L: They caught two guys just as they were getting on a plane.

P: Who?

L: They caught two fellows just as they were getting on a plane.

P: Who's that?

L: Jordan and McCoy.

P: Uh, huh.

L: They were going to South America and they caught them just as they were getting on, you know. I don't know what you wanted to do. And so I thought I'd call. She told me to call you at eight o'clock.

P: Like I told you before, Jack, you will have to come in on

your own.

L: Uh, huh. Well I can talk to her. I have three cents, and you know, where to talk, where to come back, you know. I haven't got three cents for tickets.

P: Well, what do you want to do?

L: Well that's what I said - you know - pay the way. I haven't got three cents. I can't get a load here.

P: I don't want it to look like - as if I'm paying you to come in.

L: Oh, no, What the hell, you know. If I go there and testify under oath and tell the truth, then everybody's going to go to jail.

P: If I a here -- you come in, looks like I'm paying your way, that's no good.

L: Oh shit. No, she said it, you know.

P: She asked me to bring the money up there. I'm not going to do that.

L: No, I'll tell her to go back up there. She should feel alright by tomorrow. No use making those trips, you know, for waste.

P: Uh.

L: She said you were going to call her after I talked to you.

P: Yea.

L: If you want her to come up there, well just tell her to come up there and quit talking.

P: Uh huh.

L: I made an affidavit and everything, Jesus Christ. I don't

want everybody to go to jail; that's what's got to happen if I swear to - uh - all the thing, you know.

P: What did you say?

L: I said if I get on the stand and swear to the truth, everybody's going to jail.

P: Uh huh.

L: Well I've only got about a dollar and a quarter change, so I'm going to have to hang up. So give her a buzz --

P: You want me to call her?

L: And let her know what you're going to do.

P: Uh huh. Can't you -- you'll have to come in on your own. I might as well tell you that now.

L: Well I haven't got eight cents. I won't be able to do it. I couldn't get a ticket anywhere. I mean if she can send it to me, if she can get it from her brother or somebody else, that'd be alright, but I don't know whether they got it or not.

P: Well, that'd be better.

L: I doubt if they've even got it, you know. The only thing is, when I get there I'd have to pay them back and I couldn't pay them back, you know.

P: Uh huh.

L: You give her a ring and see what the hell you can come out with and then I'll talk to her in the morning.

P: When you going to talk to her, now?

L: Well either tonight or in the morning. I only got a little bit of change, 'cause she can call me at the house, but here

I'm calling from a pay phone. I only got a dollar and a half more change, here.

P: O. K., then, forget it.

L: O. K.

P: O. K.

APPENDIX "C"

Leonard's Testimony	Demonstration of its Falsity
1. He never authorized his wife to contact Palermo in Philadelphia (6 R. T. 766).	1. The prosecutor's following statements to the jury: i. "There would seem to be no question that they had talked about this before she went and that they had decided that if Mrs. Leonard obtained a sum of money or promise of a sum of money that Leonard would attempt to leave the country. I don't think there is any doubt of that." (RT 7055.) ii. "And they ask you to condemn Jack Leonard because Leonard lets his wife go to Philadelphia." (49 RT 7546.) iii. " . . . Leonard's plans to obtain money were not so well made that he was ready to go to Philadelphia and get it . . ." (47 RT 7060.) (Italics ours.)
2. That he told his wife, in Los Angeles, before she left for	2. Items above.

Leonard's Testimony	Demonstration of its Falsity
Philadelphia not to talk to Palermo (8 R. T. 1054).	
3. That he did not know his wife was in Philadelphia (8 R. T. 1054).	3. Items above; and Recordings, Appendix "B", p. B-1: Leonard: "Talked to party (his wife) yesterday. She said I should call at 8 tonight."
4. That he told her he didn't want anything to do with securing $25,000 from Palermo. (8 RT 1033)	4. Items above, and Recording (Appendix "B", p. B-5): Palermo: "You know what your wife said?" Leonard: "Yeah." Palermo: "25 big ones." Leonard: "I can talk to -- as soon as I get there, I'll talk to you."
5. That he didn't want his wife in Philadelphia talking to Palermo (8 RT 1033, 1054).	5. See items above.
6. That he did not discuss with his wife, before she went East, a plan to obtain money from the defendants (8 RT 1262).	6. Items above, particularly prosecutor's statement: " . . . Leonard's plans to obtain money were not so well made that he was ready to go to

Leonard's Testimony	Demonstration of its Falsity
	Philadelphia and get it. . . ." (47 RT 7060.) (Italics ours.)
7. That in a telephone conversation with Palermo	
(1) he did not tell Palermo that he wanted to go back East a and talk to him (8 RT 1044).	(1) See Recording, Appendix "B", p. B-1: Leonard: "Think that something can be done. You know, what the hell, if I can get back and talk to you."
(2) he did not ask Palermo for money to go to Philadelphia (8 RT 1044).	(2) Recording, Appendix "B", p. B-2: Leonard: "Soon as I can get a flight or you send me the dough."
(3) he did not say to Palermo that two witnesses had already been served with subpoenas to appear in the trial of the case (8 RT 1037).	(3) Recording, Appendix "B", p. B-8: Palermo: "Do you want to see me? I'll talk to you." Leonard: "Uh, huh. Well I don't know, whether you want to do it or want to see me or not, you know, uh They started handing subpoenas out here yesterday, you know." Palermo: "Huh?"

Leonard's Testimony

Demonstration of its Falsity

Leonard: "They started handing subpoenas out here yesterday."

Palermo: "Uh, huh."

Leonard: "They caught two guys just as they were getting on a plane."

Palermo: "Who?"

Leonard: "They caught two fellows just as they were getting on a plane."

Palermo: "Who's that?"

Leonard: "Jordan and McCoy."

No. 17762

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRANK PALERMO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from
The United States District Court
Southern District of California

SUPPLEMENTAL REPLY BRIEF ON BEHALF OF FRANK PALERMO TO ANSWER TO THE SUPPLEMENTAL BRIEF

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No. 17762

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UNITED STATES COURT OF APPEALS

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vs

UNITED STATES OF AMERICA,

Appellee.

Appeal from
The United States District Court
Southern District of California

Comes now Frank Palermo and replies to arguments presented by the appellee in reference to the supplemental brief.

SUMMARY OF REPLY

1. Section 1951 of Title 18, inherently and as construed and applied in this case, violates the Fifth and Tenth Amendments to the Constitution of the United States. The so-called anti-racketeering statute was aimed at labor and labor racketeering dealing with products manufactured and shipped in commerce and was not concerned with local activities such as boxing and prize fighting. The fact that news is broadcast regard-

ing these activities does not make them commerce within the provisions of Section 1951 of Title 18.

2. There was a merger of the conspiracy and the substantive offenses since both relied on the sum total of evidence produced and were not separately considered and one did not rely on evidence not involved in the other.

3. Federal courts do not have jurisdiction under the Tenth Amendment of domestic violence, if any occurred, and is only concerned with goods and matters in interstate commerce. The Tenth Amendment forbids the federal government to invade the domain of state concern and state prosecutions. If any offenses occurred, they were purely local and not within the jurisdiction of the federal court. The indictment therefore should be dismissed.

4. A person charged with a crime is presumptively innocent until he is convicted and is entitled to bail at all times until the verdict. No constitutional provisions, statute, rule or regulation denies to an American that liberty prior to conviction if he can make bail after being accused of a crime. In a non-capital case it is a denial of due process and is a denial of the rights guaranteed by the Fifth Amendment to the Constitution and by the Eighth Amendment to the

Constitution of the United States to arbitrarily and capriciously put a person in jail prior to trial and conviction. To do so is to deny him a liberty necessary to prepare his defense adequately and without which he is denied due process of law and the equal protection of the laws.

ARGUMENT

APPELLANT CONTENDS THAT THE INDICTMENT DOES NOT BELONG IN A FEDERAL COURT

Appellee says correctly that we contend that the indictment in the case does not belong in a federal court (appellee's brief, p. 155).

This case has attempted to transfer the federal court into a police court and if this judgment is sustained it will have the effect of extending the federal powers into police court actions. Congress never intended it and neither did the framers of the Constitution. The original makers of the Constitution reserved all these powers to the states and to localities in the states and only gave those powers expressly granted by the federal Constitution. Such offenses as are charged here were not intended by the makers of the Constitution to be ballooned into federal crimes and to divert the federal courts into state courts

covering offenses exclusively reserved to the states (Tenth Amendment to the Constitution of the United States). It was the historic fear of the makers of our Constitution that police powers should never be lodged in the central government and when we look around the world and see how the concentration of police powers in the central government, through either its police or military, have enable the overthrow of governments, we can well understand the wisdom of the makers of our Constitution and the provisions contained in the Tenth Amendment to the Constitution of the United States.

Extraordinary conditions do not create or enlarge constitutional powers.

Schechter Poultry Corp. v. U.S., 295 US 495, 79 L.ed. 1570

Powers not granted to the United States by the Constitution are prohibited.

U.S. v. Butler, 297 US 1, 80 L.ed. 477

Our federal system is one of delegated powers and the administration of criminal justice rests with the state.

Tenth Amendment to the Constitution of the United States

Complaint is made by the appellee that this was raised for the first time on appeal, but constitutional

issues in which all the facts are before the court will be considered by an appellate court wherever raised in connection with the appeal.

In Pollard v. U.S., 352 US 354 at 359, the court there said:

> "The record now before us adequately states the facts for final determination of the basic issues"

and proceeded to decide the issues on the merits. The Supreme Court of the United States has repeatedly said that where constitutional issues are raised it will examine the record for its own determination whether those questions will be determined. Even a collateral attack would be subject to review by the Supreme Court of the United States.

Wells v. U.S., 318 US 257, 87 L.ed. 746

Therefore, we believe that this Court should determine whether this case, which involves a sport not specifically designated by any act of Congress as coming within its purview, is to be ballooned into a definition of "commerce" so as to come within the federal jurisdiction. We contend that it does not.

We further contend that appellee has failed to meet our argument under the Tenth Amendment and the Fifth Amendment to the Constitution of the United States.

All of the cases dealing with the anti-racketeering statute apparently have had to do with labor.

See:

Footnote to Callanan v. U.S., 364 US 587,
5 L.ed. 2d 312, at 313
138 ALR 811 (as to a collection of cases)
Footnote, 5 L.ed. at page 316, et seq.

The anti-racketeering Act of 1934, 73rd Congress, Second Session, apparently arose from the great strength which labor got in the years that followed and was aimed particularly at labor officials.

Nick v. U.S., 122 F.2d 660

Products shipped within interstate commerce were held to be of such a character as to bring the act within the commerce clause of the Constitution.

However, boxing and prize fighting, which are always done on a local level, certainly do not bring this activity within the sphere of commerce or a manufactured product shipped in interstate commerce. The mere fact that a fight might be televised or broadcast on the radio does not make the fight or fighting activities commerce any more than a broadcast from Congress or by political speakers make it commerce. As construed and applied in this case, we respectfully contend that boxing and prize fighting are not

"commerce" within the commerce clause of the Constitution and that therefore the indictment fails to state an offense against the laws of the United States.

Where no public offense is stated within the purview of the laws of the United States, it may be raised at any stage of the proceedings and even attacked collaterally by Section 2255 of Title 28 or by habeas corpus.

U.S. v. Resnick, 299 US 207, 81 L.ed. 127

U.S. v. Lacher, 134 US 624, 33 L.ed. 1080

Monge v. Sanford, 145 F.2d 227

Clawans v. Rives, 104 F.2d 240

It is therefore quite apparent that the anti-racketeering statute has been stretched into a domain never intended by Congress nor shown by Congress to have intended to expand the federal government into state court activities of the nature of boxing and prize fighting. Had Congress intended to do so, there would have been no reason why either in the statutes or in the debates on the subject prize fighting and boxing might not have been mentioned.

Appellee has failed to meet our issues raised that boxing and charges growing out of it and local misconduct or violence, if any occurred, come only within the purview of the state and are forbidden

by the Tenth Amendment to come within the jurisdiction of the federal court. We renew that objection and move the Court to dismiss the indictment on the ground that the federal court does not have jurisdiction of the offenses here charged.

THE MERGER OF THE COUNTS AND CHARGES

The government in its reply to our statement that there was a merger of the conspiracy with the substantive offenses, relied on Callanan v. U.S., 364 US 587, 5 L.ed.2d 312. That case, while holding that conspiracy and the substantive offenses are separate and distinct offenses, does not hold that where all of the evidence to determine the substantive offense is relied upon for the conspiracy and they are one and the same that there is no merger. Pinkerton v. U.S., 328 US 640, 643, 90 L.ed. 1489, 1494, so held.

The Callanan case only went to the question of double punishment for the separate offenses. In the Callanan case probation was granted on the second count.

The case did not touch upon the issue of merger in the trial of the action where the sum total of the evidence for the conspiracy charges was equally the sum total of the evidence for the substantive charges. In that case Pinkerton holds that there is a merger.

Otherwise double jeopardy would set in and one would be prosecuted twice for the same offense spelled out in two different ways and this is forbidden by the Fifth Amendment to the Constitution of the United States.

See:

Section 654 Penal Code, State of California

Ex parte Lang, 18 Wall. (85 US 163, 21 L.ed. 872)

Kepner v. U.S., 195 US 100, 49 L.ed. 114

Fifth Amendment to the Constutition of the United States

Jarl v. U.S., 19 F.2d 891

Callanan only went to the issue of punishment and did not set forth the facts showing that the conspiracy charges and substantive offenses were based upon the same evidence and did not raise the point we have raised here.

BAIL PENDING APPEAL

Appellee in its brief takes the position that the denial of bail during trial was res judicata because this Court, in two decisions, while first authorizing bail in the second decision, upheld the trial court in revoking bail during trial.

Carbo v. U.S., 288 F.2d 282

Carbo v. U.S., 288 F.2d 686

That case, while upholding the right to bail, did not pass upon the issue as to whether such a denial of bail constituted a denial of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States and to the historic right to bail in order to adequately and properly prepare one's defense.

Although the case of Carbo v. U.S. held that a court may revoke bail during a non-capital trial if there is reason to believe the trial may be disrupted or impeded by flight of a defendant or by his activities in or out of the courtroom during the trial, no such provision is contained either in the Constitution or in the Federal Rules of Criminal Procedure.

Furthermore, as to the appellant Frank Palermo, for whom this brief is being written, there was no evidence and there is no evidence that he would flee

or that he did not respond at all times to the orders of the court or that he was in any way involved in impeding the progress of the trial. Each defendant must be looked upon separately.

Prior to the conclusion of the trial the defendants were presumed and are presumed at law to be innocent and there is no authority in the United States for putting an innocent man in jail and holding him there without bail in a non-capital case. We respectfully state that to do so, when he is able to make bond, is to deprive him of his liberty without due process of law and to deprive him of his right fully and adequately to prepare his defense and to confer with his lawyers at all times in that preparation.

Stack v. Boyle, 342 US 1, 96 L.ed. 3

Hudson v. Parker, 156 US 277, 295, 39 L.ed. 424

Indeed, it is stated in Carbo v. U.S., 288 F.2d 282:

> "Indeed freedom from custody, cherished at all times has special importance to an individual while he is defending himself in a criminal prosecution.

But if a court may arbitrarily take that freedom away because he does not like the character of the

defendant or because he has orders from Washington or because of pressures, political, publicity-wise or otherwise, it is taking away a fundamental right guaranteed by the Constitution and denies to the defendant that type of liberty which would enable him fairly to prepare and defend himself in his trouble. This type of procedure might be well in totalitarian countries, against which we seek to set an example, but certainly nothing in the law justifies this procedure which deprived this defendant of a constitutional right guaranteed by the Eighth Amendment to the Constitution and by all decisions heretofore relating to bail. Certainly this point, which has been slid over by the appellee because it cannot be met by any logical answer, deserves the fullest consideration by this Court on an appeal from the judgments and from the constitutional rights presented herein.

It is ridiculous to say that the great United States, with all its law enforcement agencies and its protective resources, has to put a man or five men in jail to protect some prize fighter or his manager. The idea is absurd and laughable. The government has always been able to protect its witnesses and the law provides that even witnesses may be placed in protective custody but does not provide that the

defendant who is accused can be put into jail because the witness claims to have received some telephone calls of a threatening nature.

CONCLUSION

We adopt all of the points applicable to this appellant that may be presented in other briefs. Eastern counsel for Frank Palermo may be filing a separate response as to the points raised earlier in the opening brief.

We pray for reversal of the judgment below and for an order dismissing the indictment as beyond the jurisdiction of the federal court.

Respectfully submitted,

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FRANK PALERMO

Morris Lavine, counsel of record for Frank Palermo, hereby certifies that he has examined Rules 18 and 19 of the Rules of the United States Court of Appeals for the Ninth Circuit and is familiar with the same and that he believes that this supplemental answer to the appellee's reply brief conforms to those Rules.

Dated: September 29, 1962.

Morris Lavine

Attorney for Appellant Frank Palermo